TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

No. 1207.

WILLIAM FERGUSON, ISAAC A. FERGUSON, E. E. FERGUSON, WILLIAM H. FERGUSON, ALBERT L. FERGUSON, ANN J. FERGUSON, ELIMER C. FERGUSON, R. S. JACOBY, CASSIE JACOBY, SARAH BARBOUR AND A. G. BARBOUR, APPELLANTS,

vs.

GEORGE G. DENT, JAMES E. DILLARD, THOMAS BUCHANAN, H. BUCHANAN, JOHN JOHNSON, WILLIAM BARBOUR, R. A. PARKER, THE DE SOTO BUILDING AND LOAN ASSOCIATION OF MEMPHIS, TENNESSEE, SUSAN R. HOOPER ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED NOVEMBER 23, 1886.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

No. 1297.

WILLIAM FERGUSON, ISAAC A. FERGUSON, E. E. FERGUSON, WILLIAM H. FERGUSON, ALBERT L. FERGUSON, ANN J. FERGUSON, ELIMER C. FERGUSON, R. S. JACOBY, CASSIE JACOBY, SARAH BARBOUR AND A. G. BARBOUR, APPELLANTS,

vs.

GEORGE G. DENT, JAMES E. DILLARD, THOMAS BUCHANAN, H. BUCHANAN, JOHN JOHNSON, WILLIAM BARBOUR, R. A. PARKER, THE DE SOTO BUILDING AND LOAN ASSOCIATION OF MEMPHIS, TENNESSEE, SUSAN R. HOOPER ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

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1 *Final Decree.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the —— Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof begun and held for its May term, A. D. 1885, at the United States courthouse in the city of Memphis, in said district, on, to wit, the first day of August, A. D. 1885, in the following cause, to wit:

WILLIAM FERGUSON *et al.*, Plaintiff-,
vs.
GEORGE G. DENT *et al.*, Defendant-. } No. 372. Equity.

This cause came on to be heard on the 24th day of May, 1884, on the pleadings and proof, and the court being of opinion that the plaintiffs are entitled to a decree according to their prayer for relief, it is therefore ordered, adjudged, and decreed that the plaintiffs, William Ferguson, Elimer C. Ferguson, A. G. Barbour, Ann J. Ferguson, Sarah Barbour, Cassie Jacoby, and R. S. Jacoby, recover the title and possession of the lands in controversy in this suit from the defendants, George G. Dent, Thomas Buchanan, James E. Dillard, William Barbour, Sarah L. Dent, H. Buchanan, John Johnson, C,
W. Frazer, R. A. Parker, The De Soto Building and Loan Asso-
2 ciation, Susan Dent, Mary Dent, Henry G. Dent, Susan R. Hooper, W. G. Hooper, and M. B. Trezevant, which said lands and real property thus discovered by plaintiffs of and from the said defendants is located in the city of Memphis, county of Shelby, and State of Tennessee, and is bounded and described as follows, to wit: A certain part of lot 1, in block No. 46, beginning at the southeast intersection of Beal and Hernando streets, running thence east with the south line of Beal street 72 feet to a stake; thence south 125 feet to an alley; thence westwardly with said alley 72 feet to Hernando street; thence northwardly with Hernando street 125 feet to Beal street, at the point of beginning; also a certain other part or portion of said lot No. 1, in block 46, commencing on the southwestern intersection of Beal and De Soto streets; thence west with the south side of Beal street 60 feet or more to Joe Clonston's line; thence south with Joe Clonston's line 125 feet to an alley; thence eastwardly with said alley 60 feet or more to De Soto street; thence north with the west line of De Soto street 125 feet to Beal street, at the point of beginning; also a certain other part of lot No. 1, of block 46, commencing at a point on the south side of Beal street 142 feet west from De Soto street, at Goodlet's west line; thence west with the
south line of Beal street one hundred and fifty feet or more
3 to Thomas Ford's east line; thence south 125 feet to an alley; thence eastwardly with said alley 150 feet or more to Goodlet's west line; thence north 125 feet to the point of beginning, on Beal street; also the following part of lot No. 2, in block 51, begin-

ning at a point on the south side of the engine-house lot, running thence southwardly 10 feet; thence eastwardly 150 feet to a stake; thence north 10 feet; thence west with the south line of said engine-house lot 150 feet to De Soto street; also a certain other part of lot 2, in block No. 51, beginning at a point 150 feet from the east side of De Soto street and at the northeast corner of said engine-house lot, running thence eastwardly 98 feet; thence southwardly 104 feet to a stake; thence westwardly 98 feet to a stake; thence northwardly 104 feet to the point of beginning; also a part of lot No. 3, in said block 51, beginning at a point 150 feet from the east side of De Soto street at the south line of said lot 2, running thence southwardly 100 feet, more or less, to an alley; thence eastwardly 150 feet to a stake; thence northwardly 100 feet or more to a stake; thence westwardly 150 feet to the point of beginning; also a certain other lot in said city, which is bounded and described as follows, to wit: Part of a lot in block No. 62 beginning at a point on the south side of an alley 120 feet east from De Soto street, running thence eastwardly 28 feet by a depth southwardly of 160 feet, being the same described in the deed of A. M. Ferguson, executed February 24th, 1869, and registered in the register's office of Shelby county and State of
4 Tennessee in book 70, pages 434 and 435. This decree covers and conveys to plaintiffs all the interest and title of the defendants or any of them in and to said lot 1, block 46, and lots Nos. 2 and 3, in block 51, and in said block No. 62, and in case the foregoing description proves in anywise inadequate or defective the property and claims of each and all of the defendants in and to said lots or any of them is hereby conveyed to the plaintiffs by reason of the finding of the court on the issues joined in a more comprehensive description of the property in the pleadings.

It is further ordered, adjudged, and decreed that the agreement made Exhibit A to the answers of George G. Dent and Sarah L. Dent, dated May 14, 1869, be, and the same is hereby, rescinded, cancelled, and annulled, and that no title whatever passed to the late Henry G. Dent, his widow, heirs, or assigns, by reason of said agreement of May 14, 1869.

It is further ordered, adjudged, and decreed that all deeds, judgments, decrees, sales, or other muniments of title which purport to place the title of any of said property out of the late Alexander M. Ferguson, deceased, and to place title in the defendants or other persons are clouds on the title of plaintiffs, and as such are hereby cancelled and annulled. All deeds, judgments, transfers, levies, sales, or decrees or other muniments of title of the defendants or any of them are hereby cancelled and vacated and annulled as clouds on the title of plaintiffs.

It is further ordered, adjudged, and decreed that all the right, title, and interest of the defendants, George G. Dent, Thomas Buchanan, James E. Dillard, William Barbour, Sarah L. Dent, H. Buchanan, John Johnson, C. W. Frazer, R. A. Parker, Susan
5 Dent, Mary Dent, Henry G. Dent, Jr., The De Soto Building and Loan Association, Susan R. Hooper, W. G. Hooper, and M. B. Trezevant, in and to the said real property be, and the same

is hereby, divested out of them, their heirs and assigns, and the same is hereby vested in plaintiffs, William Ferguson, Elimer C. Ferguson, Ann J. Ferguson, A. G. Barbour, Sarah Barbour, Cassie Jacoby, and R. S. Jacoby, their heirs and assigns, forever, as heirs-at-law of the late Alexander M. Ferguson, and free from all demands of said defendants or any of them, according to the laws of descent of the State of Tennessee. The said A. G. Barbour and R. S. Jacoby are the husbands of the two only children of Mrs. Humphreys, a sister of the said A. M. Ferguson, and are no heirs. The said Ann J. Ferguson's rights are only those of widow of John Ferguson, a deceased brother of A. M. Ferguson, and as guardian *ad litem* of Elimer C. Ferguson. The said William Ferguson is a brother of said A. M. Ferguson, deceased. The said Elimer C. Ferguson is the only child of the said John Ferguson, deceased. This vestiture of title in plaintiffs gives each of them such interests as they are entitled to by the said laws of descent.

The prayer of the plaintiffs for an account is disallowed, it being the intention of this decree that it shall be a final settlement of all matters between them concerning the property decreed to plaintiffs.

It is further ordered, adjudged, and decreed that the de-
6 fendants, Susan R. Hooper, George G. Dent, Sarah L. Dent, W. G. Hooper, Susan Dent, Mary Dent, Henry G. Dent, Jr., and C. W. Fraser, their agents and attorneys, be, and they are hereby, forever restrained and enjoined from further prosecuting the suit of Louis Lelly *vs.* A. M. Ferguson, No. 53, rule docket, in the chancery court of Shelby county, State of Tennessee, and which suit is more especially mentioned in the pleadings and proof in the case.

It is further ordered, adjudged, and decreed that the plaintiffs have and recover of and from the defendant, Sarah L. Dent, and C. W. Frazer and George G. Dent, her sureties on the refunding bond given in this cause, the just and full sum of two hundred and seventy dollars and ninety-six cents, this being the amount of rents paid the said Sarah L. Dent and interest thereon, under the provision of said refunding bond. The cross-bills of C. W. Fraser and M. B. Trezevant are hereby dismissed at their costs, and they will each pay their part of the cost of these proceedings, for which execution as at law will issue. The issues between plaintiffs and the De Soto Building [and] Loan Association are hereby decreed in favor of plaintiffs, and the said De Soto Building and Loan Association will pay the costs of its part of these proceedings herein, for which execution as at law will issue. The receiver will turn over the possession of the property to the plaintiffs in this cause. A writ of pos-
7 session will issue in favor of the plaintiffs and against the defendants and against W. A. Wheatley, receiver, and all his tenants or the tenants of said defendants or any of them, and all persons whatsoever, to place the plaintiffs in the peaceable and quiet possession of said property against all the defendants and said receiver and his tenants or other parties or persons. The receiver will file and settle his accounts with the master of his court and make his settlement preparatory to his discharge. Out of the funds in the hands of the receiver the officers of the court, including the examiner,

for taking testimony, and the master, shall be paid their legal fees not already paid by the parties themselves, but this shall not include docket and deposition fees taxed to counsel for plaintiffs, until the other officers are first paid, but the same shall afterwards be paid.

It is further ordered, adjudged, and decreed that plaintiffs have and recover of and from Sarah L. Dent, George G. Dent, Susan Dent, Mary Dent, and Henry G. Dent, Jr., all the costs of the cause, including the costs which plaintiffs have already paid, or which has been or may be paid through the receiver herein, or which otherwise have accrued in the cause, for execution as at law will issue.

It having been suggested to the court that William Ferguson died since this cause was argued and submitted and while the
8 court was holding the same under advisement, it is therefore ordered, adjudged, and decreed that this decree be, and the same hereby is, entered as of the 24th of May, 1884, *nunc pro tunc*, and that this decree take effect as of this last mentioned date. The entry of this decree *nunc pro tunc* is made at the request of the plaintiffs and without the consent of defendants, only for the purpose of avoiding the necessity of a revivor of the cause, because of the suggestion of the death of William Ferguson, one of the plaintiffs, and it shall not operate to affect the right of appeal by defendants, for which and all other purposes this decree shall be taken as of the date of its actual entry. The clerk of this court will furnish to complainants or their solicitor a copy of this decree for registration on demand.

9 *Cost Bill, U. S. Circuit Court, Western District Tennessee.*

WILLIAM FERGUSON *et al.*, Plaintiff-,
vs.
GEORGE G. DENT *et al.*, Defendant-. } No. 372.

F. B. Edgington, security for costs.

Clerk's fees:

Entering appearance, 15 parties, .15	2 25
Drawing, filing, and ack. cost bonds, 4 @ 1.25	5 00
Issuing 24 process-, except for witness, 1.00	24 00
Issuing certified copies	23 00
Issuing 18 subpœnas for witnesses, .25	4 50
Ent'g and fil'g marshal's return on 42 writs, .25	10 50
Filing 370 pleadings and other papers, .10	37 00
Endors. certificate of opening 14 deps., .15	2 10
Endors. style of court and cause on 370 papers, .25	92 50
Copying — folios, papers, and orders, .10	22 00
Entering — folios, motions, and rules, .15	2 25
Entering — journal entries, 120 folios, .15	18 00
Taking 7 depositions, 115 folios, .20	23 30
Admin. 10 oath- and certificates to do., .25	2 50
Ent. mot. for judgment and ord. for costs, .30	30
Entering order for execution, .15	15

Entering on calendar 6 terms, .15	90
Entering 5 continuances, .15	75
Making copy of cost bill, .65	65
Entering 770 folios, complete record, .15	115 50
Making dockets, indexes, &c., $1, $2, $3	3 00
Issuing execution and return, 1.25	1 25
Total	391 40

Cash paid by receiver:

Printer's fee for printing record	$829 62
Master for superintending same	500 00
Examiner for taking depositions	8 20
	1,337 82

Statement.

Marshal's fees, Freeman	4 00
Clerk's fees, Bell W. Etheridge	391 40
Marshal's fees, Williamson	204 06
Attorney's docket fee, Edgington	20 00
Attorney's fees on 98 depositions, @ $2.50	245 00
Commissioner's fees, due complainants	239 85
Fees due H. E. Andrews (copies)	6 00
State court costs, due complainants	93 50
Due compl'ts, paid non-res'd't notice	3 50
" " for copies [of] records	119 50
" " W. B. Royster	30 00
" " by receiver	1,337 82
Total amount	$2,695 83

[Endorsed:] No. 372. Circuit court of the United States, western district of Tennessee. William Ferguson *vs.* George G. Dent. Cost bill. Filed first day of August, 1885. Bell W. Etheridge, clerk.

10 Supreme Court of the United States.

Know all men by these presents that we, George G. Dent, Sarah L. Dent, Thomas Buchanan, H. Buchanan, James E. Dillon, John Johnson, William Barbour, C. W. Fraser, R. A. Parker, and The Building & Loan Association of Memphis, Susan Dent, Mary Dent, Henry G. Dent, Jr., Susan R. Hooper, and W. G. Hooper, are held and firmly bound unto William Ferguson, Ann J. Ferguson, Elimer C. Ferguson, Sarah Barbour, A. G. Barbour, Cassie Jacoby, and R. S. Jacoby in the sum of one thousand dollars, to be paid to the said William Ferguson *et al.*, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals [and] dated this 28th day of September, 1885.

Whereas the above-named George G. Dent and others have prose-

cuted a writ of appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named George G. Dent and others shall prosecute their said writ of appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEORGE G. DENT.
HENRY G. DENT.
SARAH L. DENT.
SUSAN DENT.
MARY E. DENT.
C. W. FRASER. [SEAL.]
HENRY G. DENT,
MARY E. DENT,
By G. G. DENT, [SEAL.]
Guardian ad litem.
SUSAN R. HOOPER,
W. G. HOOPER,
THOS. BUCHANAN, &
H. BUCHANAN,
By G. G. DENT, *Att'y.* [SEAL.]
J. E. DILLARD. [SEAL.]
M. L. BACON, *Surety.* [SEAL.]

Surety acknowledged before me this 28th day of September, 1885, and bond approved.

E. S. HAMMOND,
Judge, etc.

[Endorsed:] No. 372. Circuit court of the United States, western district of Tennessee. William Ferguson and others *vs.* George G. Dent and others. Appeal bond to United States Supreme Court. Filed the 28th day of September, A. D. 1885. Bell W. Etheridge, clerk. W. B. Weisiger, D. C.

11 *Appeal.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof begun and held for its May term, A. D. 1885, at the United States courthouse in the city of Memphis, in said district, on, to wit, the 28th day of September, A. D. 1886, in the following cause, to wit:

WILLIAM FERGUSON *et al.*, Plaintiff-,
vs.
GEORGE D. DENT *et al.*, Defendant-. } No. 372.

In this cause, on this 28th of September, 1885, came solicitors for defendants, and in open court prayed an appeal from the final decree herein, which was granted, they having presented their bond for appeal, signed by George G. Dent, Henry G. Dent, Sarah L. Dent, Susan Dent, C. W. Frazer, Mary E. Dent, by George G. Dent, their guardian *ad litem*, and Susan R. Hooper, W. G. Hooper, Thomas Buchanan, and H. Buchanan, by G. G. Dent, attorney, and J. E. Dillard and M. L. Bacon, surety on said bond, and the court, having examined said bond and found the same executed according to law, and being satisfied with the solvency of the surety, and having ordered citation, now here approves said bond, and orders
12 same to be filed herein as the appeal bond of said defendants, and the record sent up to the Supreme Court of the United States at the October term, 1885, being the second Monday and twelfth day.

13 UNITED STATES OF AMERICA,
Western District of Tennessee:

The President of the United States to the marshal of said district, Greeting:

You are hereby commanded that of the goods and chattels, lands and tenements, of George G. Dent, Sarah L. Dent, Susan Dent, Mary Dent, and Henry G. Dent, Jr. (if to be found in your district), you cause to be made the sum of two thousand six hundred and ninety-seven dollars and eighty-seven cents, costs, the fees hereon endorsed, which William Ferguson and others lately in the circuit court of the United States for the district aforesaid, at May term, A. D. 1885, recovered against them for debt, damages, and costs, whereof the said defendants are convicted, as appears to us of record, and have you these moneys, with interest until paid, ready to render before the judge of said court, at a court to be holden at the court-house in the city of Memphis, on the fourth Monday in May, A. D. 1886, to the plaintiffs for the debt, damages, and costs aforesaid.

Herein fail not, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and seal of said circuit court, the 22d day of April, A. D. 1886.

BELL W. ETHERIDGE, *Clerk.*

Costs:

Judgment the first day of August, A. D. 1885---	
Docket fee due Edgington, $20 + $245..	265 00
Clerk's fees due H. E. Andrews, 6.00, & pl'ffs for n. r. notice, 3.50 -----------	9 50
Clerk's fees due B. W. Etheridge -----------	391 40
Marshal's fees due J. H. Freeman, 6.24; Williamson, 204.06----------	210 30

Commissioner's fees due W. B. Royster, 30, and due pl'ffs, 239.85	269 85	
Due State court, costs paid by plaintiffs	93 50	
Due pl'ffs for copies [of] records, 119.50; paid by receiver, 1,337.82	1,457 32	
		$2,697 87
		$2,697 87

Cash paid by receiver:

Cost of printing record	$829 62
Master's fee, superintending	500 00
Examiner's fees	8 20
	$1,337 82

[Endorsed:] No. 372. Circuit court of the United States, western district of Tennessee. November term, 1885. William Ferguson and others *vs.* George G. Dent and others. *Fieri facias.* Issued 24th day of April, A. D. 1886. Judg't 1st day of Aug., 1885, $2,697.87. Interest to ——. Costs, ——. Marshal's commissions, ——. T. B. Edgington, attorney for plaintiff. Returned & filed May 24, A. D. 1886. Bell W. Etheridge, clerk.

Marshal's Return.

MEMPHIS, TENN., *May* 22, 1886.

After diligent search and inquiry I am unable to find any real or personal property of the within-named defendants whereon to make levy and satisfy this writ, and on said date the same is accordingly returned to court *nulla bona* and unsatisfied.

JAS. H. FREEMAN,
U. S. Marshal.

14 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the Circuit Court of the United States within and for the Sixth Judicial Circuit.

The President of the United States to the marshal of said western district of Tennessee, Greeting:

Whereas in the circuit court of the United States for said district, on the first day of August, A. D. 1885, the same being one of the days of the May term, A. D. 1885, at Memphis, in said district, by the judgment of said court William Ferguson and others recovered against George G. Dent, Sarah L. Dent, Susan Dent, Mary Dent, and Henry G. Dent, Junior, the possession of certain tracts of land as follows: A certain part of lot 1, in block No. 46, beginning as the southeast intersection of Beale and Hernando streets, running thence east with the south line of Beal street 72 feet to a stake; thence south 125 feet to an alley; thence westwardly with said alley 72 feet to Hernando street; thence northwardly with Hernando street 125 feet

to Beal street, at the point of beginning; also a certain other part or portion of said lot No. 1, in *in* block 46, commencing on the southwestern intersection of Beal and De Soto streets, thence west with the south side of Beal street 60 feet or more to Joe Clonston's line; thence south with Joe Clonston's line 125 feet to an alley; thence eastwardly with said alley 60 feet or more to De Soto street; thence north with the west line of De Soto street 125 feet to Beal street, at the point of beginning; also a certain other part of lot No. 1, of block 46, commencing at a point on the south side of Beal street 142 feet west from De Soto street, at Goodlet's west line, thence west with the south line of Beal street 150 feet or more to Thomas Ford's east line; thence south 125 feet to an alley; thence eastwardly with said alley 150 feet or more to Goodlet's west line; thence north 125
15 feet to the point of beginning on Beal street; also the following part of lot 2, in block 51: Beginning at a point on the south side of the engine-house lot, running thence southwardly 10 feet; thence eastwardly 150 feet to a stake; thence north 10 feet; thence west with the south line of said engine-house lot 150 feet to De Soto street; also a certain other part of lot 2, in block No. 51, beginning at a point 150 feet from the east side of De Soto street and at the northeast corner of said engine-house lot, running thence eastwardly 98 feet; thence southwardly 104 feet to a stake; thence westwardly 98 feet to a stake; thence northwardly 104 feet to the point of beginning; also a part of lot No. 3, in said block 51, beginning at a point 150 feet from the east side of De Soto street, at the south line of said lot No. 2, running thence southwardly 100 feet, more or less, to an alley; thence eastwardly 150 feet to a stake; thence northwardly 100 feet or more to a stake; thence westwardly 150 feet to the point of beginning; also a certain other lot in said city of Memphis, which is bounded and described as follows, to wit: Part of a lot in block No. 62, beginning at a point on the south side of an alley 120 feet east from De Soto street, running thence eastwardly 28 feet by a depth southwardly of 160 feet, being the same land described in the deed of A. M. Ferguson, executed February 24th, 1869, and registered in the register's office of Shelby county and State
16 of Tennessee, in book 70, pages 434 and 435, together with the appurtenances, situate in Memphis, in the county of Shelby, in the State of Tennessee, in said District, whereof the said George G. Dent, Sarah L. Dent, Susan Dent, Mary Dent, Henry G. Dent, Junior, and W. A. Wheatley, receiver, are convicted, as appears to us of record:

Therefore you are hereby commanded that without delay you cause the said William Ferguson and others to have possession of the said tracts of land, with the appurtenances. And in what manner you shall have executed this writ make appear to us at a court to be holden at said Memphis on the fourth Monday of May, A D. 1886.

Herein fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the

Supreme Court of the United States, and seal of said circuit court, this 23d day of April, A. D. 1886.

[L. S.] BELL W. ETHERIDGE, *Clerk.*

Marshal's Return.

MEMPHIS, TENNESSEE, *April* 23*d*, 1886.

Pursuant to the commands of this writ, and on said April 23d, 1886, and upon application of T. B. Edgington, solicitor for the within-named complainants, Wm. Ferguson and others, I personally took said T. B. Edgington in, around, and upon each and every [of] the within-named premises, showed unto him the metes and bounds thereof, and then and there, and in presence of Wm. A. Wheatley, left the said T. B. Edgington, as such solicitor for the complainants herein named, in quiet and peaceable and undisturbed possession of the within-named premises; all of which is further evidenced by his receipt therefor, which is hereunto attached
17 and made part of this my return of service of and under this writ, and the same is accordingly returned to court.

JAMES H. FREEMAN,
U. S. Marshal,
By CHARLES S. TALLIAFERRO, *Deputy.*

Complainant's Receipt for Property.

On this April 23d, 1886, and under and by virtue of a writ of possession issued out of said court and in the above-entitled cause, wherein the marshal of said court and of the western district of Tennessee was commanded to place in possession of William Ferguson *et al.* the real estate in said writ fully detailed and described, I hereby certify to have received from Jas. H. Freeman, U. S. marshal for said district, through his deputy, Charles S. Talliaferro, in pursuance of said writ, the hereinafter-described realty as embraced in and under said writ, and further certify that said marshal, thro' said deputy, has placed me and so left me in quiet, peaceable, and undisturbed possession of the premises, viz:

1. Part lot 1, block 46, 72 x 125 feet, S. E. corner Beal & Hernando streets.
2. Part lot 1, block 46, 60 x 125 feet, S. W. corner Beal & De Soto streets.
3. Part lot 1, block 46, 150 x 125 feet, on S. S. Beal street, beginning 142 feet from De Soto street & adjoining Goodlet's west line.
4. Part lot 2, block 51, 10 x 150 feet, on E. S. De Soto St. and adjoining the engine-house lot.
5. Part lot 2, block 51, 98 by 104 feet, adjoining s'd engine-house lot.
6. Part lot 3, block 51, 100 x 150 feet, on south side De Soto street.
7. Part lot in block 62, 28 x 160 feet, *vide* deed book 70, pp. 434, 435.

T. B. EDGINGTON,
Solicitor for Plaintiffs.

18 *Decree.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof begun and held for its November term, A. D. 1885, at the United States court-house in the city of Memphis, in said district, on, to wit, the 26th day of April, A. D. 1886, in the following cause, to wit:

WILLIAM FERGUSON *et al.*, Plaintiff-,
vs.
GEORGE G. DENT *et al.*, Defendant-. } No. 372.

It appearing in this case that since the adjournment of the court and in the absence of any judge thereof from the district, and on application to the clerk, that official assumed to issue a writ of possession to dispossess the receiver of this court from the possession of the property in controversy, and that by virtue of such pretended writ the said receiver has been put out of possession thereof, it is now ordered that all the actings and doings of the marshal under said pretended writ be, and the same are hereby, vacated and annulled, and the possession of the receiver restored as if said dispossession had never taken place. The clerk will issue a copy of this order to the receiver and to the marshal, who will serve it upon all persons in possession or claiming possession under said pretended writ, and replace the said receiver in possession as of his former authority.

19 Circuit Court of the United States, Western District of Tennessee.

WILLIAM FERGUSON *et al.*
vs.
GEORGE G. DENT *et al.* } No. 372.

"It appearing in this case that since the adjournment of this court and in the absence of any judge thereof from the district, and on application to the clerk, that official assumed to issue a writ of possession to dispossess the receiver of this court from the possession of the property in controversy, and that by virtue of said pretended writ the said receiver has been put out of possession thereof, it is now ordered that all the actings and doings of the marshal under said pretended writ be, and the same are hereby, vacated and annulled, and the possession of the receiver restored as if said dispossession had never taken place. The clerk will issue a copy of this order to the receiver and to the marshal, who will serve it upon all persons in possession or claiming possession under the said pre-

tended writ, and replace the said receiver in possession as of his former authority."

April 26, 1886.

E. S. HAMMOND, *Judge.*

20 To the clerk:

Enter the foregoing order and issue copies as directed.

E. S. HAMMOND.

Marshal's Return of Above.

On this 26th day of April, A. D. 1886, and in obedience to the within order, I served [a] true copy hereof on W. A. Wheatley, receiver, and also took him around and put him in complete possession of the property herein from which he had been dispossessed.

JAMES H. FREEMAN,
U. S. Marshal.
By M. WHITLOW,
Special Deputy.

21 *Motion.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court, at a regular term thereof begun and held for its November term, A. D. 1885, at the United States court-house in the city of Memphis, in said district, on, to wit, the 22d day of May, A. D. 1886, in the following cause, to wit:

WILLIAM FERGUSON *et al.*, Plaintiff-,
vs.
GEORGE G. DENT *et al.*, Defendant-. } No. 372.

Came the plaintiffs and moved the court for an order discharging the receiver and requiring him to turn over the property to plaintiffs, and for a writ of possession or writ of assistance to place plaintiffs in possession, and for an order of this court vacating its former order reinstating the receiver, and for an order to restore the possession of the property to plaintiffs, which said motions were by the court ordered to be continued over to the next term of this court for hearing.

22 *Affidavit of W. B. Weisiger. Filed Sept'r* 30, 1886.

Circuit Court of the United States, Western District of Tennessee.

WILLIAM FERGUSON *et al.*
vs.
GEORGE G. DENT *et al.* } No. 372.

Personally appeared before me, Bell W. Etheridge, clerk of said

court, W. B. Weisiger, who, being duly sworn, deposes and says that the appeal bond in this cause was filled out by him from another bond which had been left in the charge of the clerk. Affiant says that C. W. Frazer brought an appeal bond in this cause and it was left on the clerk's desk to be completed. This bond was one of the usual blank appeal bonds kept in the clerk's office. Col. Frazer had obtained a blank from the office and filled it up in his own handwriting. When the parties came up to execute said bond it was found to be so dirty and so much soiled that affiant, in the presence of G. G. Dent and with his approval, got a clean blank from his files of blank bonds, which blank was identical in form and substance with the one said Frazer had obtained and filled out in his own handwriting. Affiant simply copied the bond as filled up by said Frazer, and when the same was copied it was thereupon executed by the parties. George G. Dent was present at the
23 time the bond was copied, and he signed it right there, according to my recollection. Affiant says he attempted to make a true and correct copy of the bond filled out by C. W. Frazer, and he believes he did so. Affiant is satisfied that the word "damages" was not in said bond, or he would have copied it into the bond that was accepted by the court as the appeal bond. This is a true and correct statement of the facts, to the best of my knowledge and belief.

W. B. WEISIGER.

Sworn to and subscribed before me this June 29th, 1886.

BELL W. ETHERIDGE, *Clerk.*

Affidavit of T. B. Edgington. Filed June 28, 1886.

WILLIAM FERGUSON *et al.*
vs.
GEORGE G. DENT *et al.* } 372.

T. B. Edgington, being duly sworn, deposes and says that he is of counsel for plaintiffs in this cause, and drafted the decree from which the appeal is taken. Affiant was informed that the parties had given an appeal and supersedeas bond, but he never examined the bond until a motion was made in April, 1886, to reinstate, which I had caused to be stricken from the docket under the provisions of rule 9 of the Supreme Court. Information that an ap-
24 peal had been perfected must have been communicated to me about the first of October, 1885, and in the following December, under the impression that the appellants would not send up the record, the motion was made in the Supreme Court and granted striking the cause from the docket. The receiver was continuing to collect the rents and apply them on taxes. Affiant rested under the belief that the plaintiffs would soon be put in possession of the property under the mandate of the Supreme Court. Affiant never examined the appeal bond, and never saw it until in the month of April, 1886, and then learned for the first time that it was a supersedeas bond. So soon as he learned this fact he applied for a writ

of possession and *fieri facias*. The writ of possession was executed and the property was turned over to plaintiffs. The receiver not only did not make any objection to the mode of executing the writ, but so soon as the marshal called on him with the writ of possession he accompanied the marshal to the property and explained to the tenants its nature and effect. Affiant had previously called on the receiver and informed him that the writ of possession would probably issue, and affiant requested the receiver to take advice of independent counsel as to his rights and duties in the premises, so that he might be prepared to act promptly and advisedly when the writ of possession would be issued.

And further deponent saith not.

T. B. EDGINGTON.

Subscribed and sworn to before me this June 28th, A. D. 1886.

W. B. WEISIGER,
Deputy Clerk.

Affidavit of C. W. Frazer. Filed June 26, 1886.

WILLIAM FERGUSON *et al.*
vs.
GEORGE G. DENT *et al.* } 372.

Personally appeared before the undersigned, a notary public for Shelby county, Tennessee, duly commissioned, C. W. Frazer, who, after being duly sworn, says that on the trial of the above cause, before the Hon. Justice Matthews and Judge E. S. Hammond, at Memphis, in the western district of Tennessee, in 1885, he was acting as solicitor for Mrs. S. L. Dent, a defendant therein, and that when the Hon. E. S. Hammond was delivering the opinion of the court he stated that, inasmuch as Justice Matthews and himself had decided that the record, as printed, should be sent up in case of appeal as the transcript *pro tanto*, and the Supreme Court requested to so consider it, and inasmuch as all the real estate involved was in the hands of a receiver appointed by the court, and would so remain, that he would fix the bond for appeal at one thousand dollars, and [it] should and would operate as a supersedeas until said cause was heard. Affiant further states that, under the direction of the court, the clerk *clerk* made out the bond as filed, and that the same having been executed, he presented it to Judge Hammond for approval; that in more than one conversation with Judge Hammond it was distinctly understood that said bond when executed would operate as a supersedeas, for affiant was particularly solicitous on this point, and his recollection now is that Judge Hammond himself drew the order approving said bond and granting the appeal, and stated to affiant that he would see that the proper order was entered and the appeal perfected as affiant desired. Affiant never heard any question raised about this matter until the 23d of April, 1886, when, on learning a writ of possession had issued, he examined the record and found the appeal bond was not conditioned for damages. Affiant did not examine the bond at the time

of execution, nor has he since, until this instant, but took it upon the faith that the clerk had filled it out properly, and that the judge would see that it was a proper bond and in accordance with his statements in court and to affiant.

27 C. W. FRAZER.

Subscribed and sworn to before me this 23d day of June, A. D. 1886.

T. R. BOYLE,
Notary Public.

Affidavit of D. H. Poston. Filed June 26, 1886.

WILLIAM FERGUSON *et al.*
vs.
GEORGE G. DENT *et al.* } 372.

And D. H. Poston, being duly sworn, on oath says he was one of the counsel for defendant Dents, and was present when the decision in the above case was announced by his honor Judge Hammond, and fully corroborates C. W. Frazer in his statement to the effect that Judge Hammond announced from the bench that upon a conference with the Hon. Stanley Matthews they had agreed that, inasmuch as the record was in the main already printed and the property already in the hands of a receiver, *that* they would only require a supersedeas bond, with good security, in the penalty of one thousand dollars, to be given within sixty days. This bond affiant's clients agreed to give, and only learned within the past few days that it was only for costs, as all parties thought it was given as a supersedeas bond, as it was intended to be. The error he is satisfied was unintentional and a clear oversight and mistake, as all parties

28 had agreed upon giving the bond to supersede the decree, and it was for nearly a year so treated and acted upon by complainants, and the error was only discovered within the past sixty days. Affiant is satisfied that the omission was a clerical mistake and oversight upon the part of all the parties, as well as the court, as it was the clear intention of both counsel, appellants, and the court in taking the bond that it should be and operate as a supersedeas bond.

D. H. POSTON.

Subscribed and sworn to before me this 22d day of June, A. D. 1886.

F. P. POSTON,
Notary Public, Shelby Co., Tenn.

29 *Order of Court.*

Circuit Court of the United States, Western District of Tennessee, thirtieth day of September, 1886.

WILLIAM FERGUSON *et al.*, Plaintiffs,
vs.
GEORGE G. DENT *et al.*, Defendants. } 372.

Because it appears to the court that the appeal bond filed herein on the 28th day of September, A. D. 1885, was intended by the obligors, the court, and the judge approving the bond to operate as a supersedeas, but that by some mistake the words "and damages" were unintentionally omitted from the condition thereof, the motion of the plaintiffs to vacate the order of April 26, 1886, recalling the writ of possession issued by the clerk and to now proceed with the execution of the final decree of August 1, 1885, by such orders as may be necessary to discharge the receiver and deliver possession of the property in dispute to the plaintiffs pending the appeal of the defendants herein is denied; and for the same reason, on motion of defendants, they are permitted to amend the said bond by interlining the words so unintentionally omitted in the place left for them in the printed blank upon which the said bond was executed if the surety in the bond shall in writing endorse thereon his consent thereto; and it is ordered that the bond shall then operate as if said words had originally been inserted therein. And thereupon
30 the *the* said M. L. Bacon, surety as aforesaid in the said bond, appeared in open court, and declined to consent to the change in the bond as above allowed. And thereupon defendants moved the court to be allowed to file another bond, conditioned as required by law, to operate as a supersedeas; whereupon they tendered a bond, with J. H. Malone and W. H. Robinson as sureties, conditioned as therein expressed, which said bond is hereby accepted and approved; and it is ordered that, according to the tenor and effect thereof as established by law and by the consent of said sureties and the defendants herein, it shall be taken and in all respects operate to supersede the said final decree pending the appeal heretofore granted in this case, and that in pursuance thereof, and in obedience to the statutes in that behalf regulating the supersedeas of proceedings pending an appeal, the execution of said decree be, and it is hereby, stayed as it has been heretofore stayed since the said appeal was taken, the property remaining in the hands of the receiver as heretofore; the original bond not to be affected in any way by the allowance of the new bond, but to stand as if this order had never been made.

To all of which — except, and ask that their exceptions be
31 entered of record, and that the affidavits used upon both sides upon the hearing of these motions be filed as a part of the record and taken as such to all intents and purposes as if they were incorporated in a bill of exceptions, which, in that respect, this order shall be taken to be, which is granted and is done accordingly. And thereupon the plaintiffs pray an appeal from this

order and from that of April 26, A. D. 1886, which is allowed, and their bond for two hundred and fifty dollars, conditioned as appeal bonds are required by law to be, with T. B. Edgington as surety therein, executed and filed this day, is accepted and approved by the court, the defendants in open court waiving all other citation and notice.

The affidavits so used upon the hearing of these motions and so as above made a part of the record and as though embraced in a bill of exceptions for the purposes of this appeal being those of C. W. Frazer and D. H. Poston, dated June 22, A. D. 1886, and of T. B. Edgington, dated June 28th, A. D. 1886, and of W. B. Weisiger, dated June 29th, A. D. 1886, the same being properly filed and entitled in this cause.

Memphis, Tenn., Sept. 30, 1886.

E. S. HAMMOND, [SEAL.]
Judge, &c.

[Endorsed:] No. 372. Circuit court of the United States, western district of Tennessee. William Ferguson *et al. vs.* George G. Dent *et al.* Order of court. Entered and filed 30th day of September, 1886. J. B. Clough, clerk.

32 Supreme Court of the United States

Know all men by these presents that we, George G. Dent, Sarah L. Dent, Thomas Buchanan, H. Buchanan, James E. Dillon, John Johnson, William Barbour, C. W. Frazer, R. A. Parker, The De Soto Building and Loan Association of Memphis, Tennessee, Susan Dent, Mary Dent, Henry G. Dent, Jr., Susan R. Hooper and W. G. Hooper, as principals, and J. H. Malone and W. H. Robinson as sureties, are held and firmly bound unto William Ferguson, Anna J. Ferguson, Elimer C. Ferguson, Sarah Barbour, A. G. Barbour, Cassie Jacoby, and R. S. Jacoby in the sum of one thousand ($1,000.00) dollars, to be paid to the said William Ferguson, Ann J. Ferguson, Elimer C. Ferguson, Sarah Barbour, A. G. Barbour, Cassie Jacoby, and R. S. Jacoby, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals [and] dated this 30th day of September, A. D. 1886.

Whereas the above-named George G. Dent, Sarah L. Dent, Thomas Buchanan, H. Buchanan, C. W. Frazer, R. A. Parker, The De Soto Building & Loan Association of Memphis, Susan Dent, Mary Dent, Henry G. Dent, Jr., Susan R. Hooper, and W. G. Hooper have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named George G. Dent, Sarah L. Dent, Thomas Buchanan, H. Buchanan, C. W. Frazer, R. A. Parker, The De Soto

Building & Loan Association of Memphis, Susan Dent, Mary Dent, Henry G. Dent, Jr., Susan R. Hooper, and W. G. Hooper shall prosecute their said appeal to effect and answer all costs and damages, if *their* shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue; and we hereby further bind ourselves and agree that this bond shall operate as of the 28th day of September, A. D. 1885, the date when the appeal bond signed by M. L. Bacon as surety was executed in this cause, and to all intents and purposes as if this bond had been then executed and filed and, according to the order of said circuit court, made and entered of record this day, allowing the execution and filing of this bond in place of that so filed and executed on September 28th, A. D. 1885, and signed by said Bacon.

GEO. G. DENT. [SEAL.]
SARAH L. DENT. [SEAL.]
J. E. DILLON. [SEAL.]
THOS. BUCHANAN.
H. BUCHANAN.
WILLIAM BARBOUR.
SUSAN DENT.
MARY DENT.
HENRY G. DENT, JR.
SUSAN R. HOOPER AND
W. G. HOOPER,
By GEO. G. DENT, [SEAL.]
Their Attorney.
C. W. FRAZER. [SEAL.]
GEORGE G. DENT,
Guardian ad litem.
J. H. MALONE. [SEAL.]
W. H. ROBINSON. [SEAL.]

Execution by sureties acknowledged before me this 30th day of September, 1886, and sureties severally qualified to their solvency in this behalf; and I hereby approve this bond and the sureties thereon as being sufficient for the penalty thereof.

Memphis, Tennessee, September 30, A. D. 1886.

E. S. HAMMOND,
U. S. District Judge.

[Endorsed:] No. 372. Circuit court of the United States, western district of Tennessee. William Ferguson *et al. vs.* George H. Dent *et al.* Appeal bond to United States Supreme Court. Filed the 30th day of September, A. D. 1886. John B. Clough, clerk.

33 Supreme Court of the United States.

Know all men by these presents that we, William Ferguson, Isaac A. Ferguson, E. E. Ferguson, William H. Ferguson, Albert L. Ferguson, Ann J. Ferguson, Ellimer C. Ferguson, R. S. Jacoby, Cassie Jacoby, Sarah Barbour, and A. G. Barbour, as principals, and T. B. Edgington, as surety, are held and firmly bound unto George G.

Dent, Sarah L. Dent, Susan Dent, Mary Dent, Henry G. Dent, James E. Dillard, Thomas Buchanan, H. Buchanan, John Johnson, William Barbour, R. A. Parker, The De Soto Building & Loan Association of Memphis, Tennessee, Susan R. Hooper, W. G. Hooper, M. B. Trezevant, and George D. Dent, guardian *ad litem*, and C. W. Frazer, in the sum of two hundred and fifty ($250.00) dollars, to be paid to the said George G. Dent, Sarah L. Dent, Susan Dent, Mary Dent, Henry G. Dent, James E. Dillard, Thomas Buchanan, H. Buchanan, John Johnson, William Barbour, R. A. Parker, De Soto Building & Loan Association of Memphis, Susan R. Hooper, W. G. Hooper, M. B. Trezevant, and George G. Dent, guardian *ad litem*, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals [and] dated this 30th day of September, 1886.

Whereas the above-named William Ferguson, Isaac A. Ferguson, E. E. Ferguson, William H. Ferguson, Albert L. Ferguson, Ann J. Ferguson, Elimer C. Ferguson, R. S. Jacoby, Cassie Jacoby, Sarah Barbour, and A. G. Barbour have prosecuted an appeal to the Supreme Court of the United States to reverse the judgments, orders, and decrees rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named William Ferguson, Isaac A. Ferguson, E. E. Ferguson, William H. Ferguson, Albert L. Ferguson, Ann J. Ferguson, Elimer C. Ferguson, R. S. Jacoby, Cassie Jacoby, Sarah Barbour, and A. G. Barbour shall prosecute their said appeals to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WILLIAM FERGUSON. [SEAL.]
ISAAC A. FERGUSON. [SEAL.]
E. E. FERGUSON. [SEAL.]
WILLIAM H. FERGUSON. [SEAL.]
ALBERT L. FERGUSON. [SEAL.]
ANN J. FERGUSON. [SEAL.]
R. S. JACOBY. [SEAL.]
CASSIE JACOBY. [SEAL.]
SARAH BARBOUR AND [SEAL.]
A. G. BARBOUR, [SEAL.]
By their attorney, T. B. EDGINGTON. [SEAL.]
T. B. EDGINGTON, *Surety.* [SEAL.]

Acknowledged before me this 30th day of September, 1886.
JOHN B. CLOUGH, *Clerk.*

This bond is hereby approved and the surety as being sufficient for the penalty of the same.

Before me this September 30, 1886—

E. S. HAMMOND,
U. S. District Judge.

[Endorsed:] No. 372. Circuit court of the United States, western district of Tennessee. William Ferguson *et al. vs.* George G. Dent *et al.* Appeal bond to United States Supreme Court. Filed the 30th day of September, A. D. 1886. John B. Clough, clerk.

34 *Opinion. September* 30, 1886.

Circuit Court of the United States, Western District of Tennessee.

WILLIAM FERGUSON *et al.*
vs.
GEORGE G. DENT *et al.* } 372.

1. *Appeal in Equity—Supersedeas Bond—Custody of Receiver Pending the Appeal.*—The omission from an appeal bond of the statutory stipulation as to damages required to effect a supersedeas does not necessarily entitle the party to whom the property is adjudged to a discharge of the receiver and possession of the property pending the appeal. The subsequent custody is a matter the court will regulate upon the equitable circumstances of each case, independently of the fact whether there has been a statutory supersedeas of the final decree or not.
2. *Same Subject—Mistake—Correction of Defective Bond.*—Whether the circuit court has authority after appeal to allow an amendment to a supersedeas bond (quere). But in the exercise of its jurisdiction to determine whether it will grant an application to execute the decree because of a defective bond, which cannot operate as a supersedeas, it may withhold execution until the Supreme Court can act in the matter, and should, if there be
35 equitable considerations of mistake which would induce a court of equity to re-form the bond on a bill for that purpose. On such an application the court is not compelled to act solely upon the one fact of a defective bond. It will inquire at large and exercise its equitable powers of relief, as in other cases, upon all the facts.
3. *Same Subject—Discharge of Receiver.*—The court will not sanction the dispossession of its receiver by a writ issued by the clerk upon the discovery of a defect in the supersedeas bond, although the final decree, if not superseded, might authorize it. The proper practice is to apply to the court to execute the decree.

T. B. Edgington for plaintiffs; Poston & Poston and L. W. Finley for defendants.

In Equity. Application to discharge receiver.

The opinion of the court and the decree entered upon this application, which is appended as useful to show what was actually done in pursuance of the opinion, sufficiently state the facts. At the last term of the Supreme Court the plaintiffs applied for a mandamus to compel the circuit court to vacate the order recalling the writ issued by the clerk, or to otherwise execute the decree by discharging the receiver and surrendering the possession to them

36 The mandamus was refused, but without any opinion or other information as to the grounds of the refusal.

HAMMOND, *J.:*

The affidavits here show, what is well known to the court, that it was intended by the defendants and the court that this bond should be a supersedeas bond. The penalty was sufficiently large to cover any damages likely to come within the liability pending the appeal. Kountze *vs.* Omah Hotel Co., 107 U. S., 378; Roberts *vs.* Cooper, 19 How., 373.

I cannot think, as suggested by the plaintiffs' counsel, that the words necessary to make it in form a supersedeas bond were designedly omitted in order to evade that responsibility; the surety understood the full extent of it as well as the defendants, for when he came to sign the bond he inquired of me and it was fully explained to him as it had been to Mr. Frazer when he drew the bond. I must protest, good-naturedly, of course, against the inaccuracies of Mr. Frazer's affidavit. He is mistaken when he states that I undertook to see that "the appeal was perfected as affiant desired." I read to him the statute, the 29th rule of the Supreme Court, and certain passages in Phillips' Practice, and warned him of the
37 strictness of the practice. I subsequently saw in the clerk's office the soiled form of bond mentioned in the affidavits as in his handwriting, but did not inspect it, and do not know whether it contained the words "and damages" or not; but he left my chambers to write a bond which would be sure to have those words in it. He is altogether mistaken when he says in his affidavit that "under the direction of the court the clerk made out the bond as filed." I gave no directions about it and had nothing to do with it, except to justify the surety and approve it, which I did, as I always do, without the least scrutiny of the bond, for it is the business of counsel to see that it is in the form they wish it, and it is a matter about which I should not and do not meddle at all.

But, in my own view, it is wholly immaterial how this mistake in the bond occurred. It is not in form a supersedeas bond; yet it operated *de facto* as a supersedeas bond for seven months, from September 29, 1885, the date it was filed, until April 23, 1886, when counsel for the plaintiffs first discovered the omission and applied to the clerk for a writ of possession to oust the receiver. I was then absent at Cleveland, Ohio, holding court, and upon my re-
38 turn, *sua sponte*, revoked the action of the clerk and restored possession to the receiver, because it was not, in my judgment, a case for action by the clerk, and the receiver could not, or properly should not, be dispossessed except upon the order of the court, and possibly not without an application to the Supreme Court itself.

It is true that the opinion in the case and the decree following it directs that "the receiver deliver possession to the plaintiffs, for which purpose a writ of possession should issue to place them in the quiet possession of the property freed from all tenants of the receiver and their effects." Ferguson *vs.* Dent, 24 Fed. Rep., 436.

But this was merely a mode of declaring the right of the plaintiffs to the property, and was not intended, at least, to direct that the receiver be dispossessed without a further order of the court to that end.

Strictly speaking there is no such thing in our equity practice as a writ of possession, and certainly none is ever needed to dispossess a receiver of the court. If a receiver should refuse to obey an order of the court possibly a writ of assistance might *might* be issued by the clerk under equity rule 9, but even that is doubtful, for it seems to provide rather for that writ as against the
39 parties to the suit without that application to the court which otherwise would have to be made. 2 Dan'l- Ch'y Prac. (1 Ed.), 724; 1 *ibid*, 643. We have in Tennessee chancery practice a "writ of possession," in analogy to that writ in ejectment at law, but that of course has no application here, though it was used in Wallen *vs.* Williams, 7 Cranch, 278. At all events this decree meant no more than would have been implied if it had not contained the directions as to a writ of possession against the receiver. Mr. Daniel says:

"The appointment of a receiver made previous to a decree will be superseded by it unless the receiver is expressly continued. A receiver, however, is never discharged by decree, but the application for his discharge must be made by petition," etc. 3 Dan'l- Chan'y Prac. (1 Ed.), 458; 2 *ibid* (5 Ed.), 1765.

Naturally enough this final decree was treated as a direct order of the court to dispossess the receiver, and strictly there should have been an order continuing his possession after the decree and pending the appeal; so, while under the circumstances, neither the plaintiffs nor the clerk would be guilty of wilful contempt in dispossessing him, yet, since he had been without any special order continuously in possession since the appeal, and
40 repeatedly orders had been given for his direction in the management of the property, it seemed to me that whether the bond justified that continued possession or not, the application to the court which is now made should have been there made before turning him out, notwithstanding the command of the final decree. Just as if the final decree, or one subsequently made, had contained specific directions for continuing the receiver pending the appeal the clerk would not have issued the writ; so that, possession having been continued in fact, he should not have issued it without a further order to that effect. For these reasons the motion to vacate the order of revocation is denied. I cannot sanction any interference with the receiver's possession without the special order of the court whose receiver he is, and, under the circumstances stated, the final decree cannot de treated as such sanction, whether the bond be a supersedeas bond or not.

It does not follow, even at law, that the court will either issue an execution or refuse to quash one issued by the clerk simply because the bail in error is fatally defective. The text writers, abridg-
41 ments, and cases show that it is very much a matter of sound discretion in the court, and one of the chief influences in

controlling that discretion is the desirability of preserving the existing status until the appellate court can exercise its undoubted power of determining whether there be, in fact, a fatal defect or not Undoubtedly the plaintiff, the clerk, and the sheriff—indeed, all th officials concerned—may be called on to determine, each for himself, just as the clerk did here, whether the judgment or decree has been superseded or not by the writ of error or appeal, and each for himself must act at his peril, for there is no tangible writ of supersedeas to guide them; it is done by implication of law from the existing facts, and the matter to be determined is whether there can be any action towards executing the judgment or decree—whether there be any supersedeas. Still, the court can always revise that action of the officials, and the fallacy is in supposing that the matter is to be always determined by either the officials or the court solely and exactly upon the face of the bail-piece, be it recognizance or bond. Often the court below will not proceed, notwithstanding the defect; and just as often
42 it will refuse to interfere where execution has in fact issued under equivocal circumstances, although there may be in fact no defect and in law a supersedeas, leaving the party to some other remedy, such as an independent action at law for the trespass or injury done. I need not say that the ultimate purpose of all concerned is to give the plaintiffs the benefit of their recovery, pending the appeal, if they be entitled to it, or the defendants the privilege of their supersedeas, if there be one; but it is a mistake to suppose that whether we shall or how we shall execute the final decree in this case, for example, depends altogether up- the fact of the omission discovered in this bond. Here, this property was taken from the defendants pending the controversy over its ownership, and without any bond at all from plaintiffs, except for costs, put into the hands of a receiver, so that the defendants could not waste it or destroy it or sell it and embarrass its recovery by plaintiffs. Now, pending the appeal, it would seem that justice requires that it should equally remain protected, if there be necessity for it, from the waste or destruction of plaintiffs or its embarrassment by their sale until the plaintiffs' right to it has been confirmed. It was not thought safe to plaintiffs to leave it with defendants pending
43 litigation in this court, because they were insolvent, etc.; and, without going into details, if these non-resident plaintiffs be not insolvent also, as to which there is no proof, they are not shown to be solvent, and it may be doubtful, at the least, whether they could respond to any claim of defendants arising out of their possession during the continuance of the litigation pending the appeal, if our decree be reversed; and if they could do that defendants would have to go to a distant State to seek a recovery. Again, they might sell the property to strangers and embarrass its recovery by the defendants, if it be theirs. The purchasers would take, *pendente lite*, no doubt, but the embarrassment would still exist. So we might have prevented that by a special injunction at the hearing, but it is too late now, and a receiver would be better for all concerned, any way, as well after as before appeal.

When we took it from the defendants, in contemplation of law, their right of possession remained, although the property was in the hands of a receiver, for which additional reason the court should, if it has the power, be careful to protect defendants' possession, which is in its keeping. If there were no statute and the court as free to act as it always was in England, it would, under the circumstances of this case, stay proceedings pending the appeal, and I doubt if
44 a case can be found surrendering a possession so taken to the triumphant plaintiff if the defendant appeals and the court be unrestricted by some limitation on its powers in that regard. Has our statute abrogated all such equitable considerations and required us here without inquiry into other facts to surrender possession because of this omission in the bond? I think not. Not even the precise language of the statute requires such a ruling. Revised Statutes 1000, 1007, 1012. The appellants cannot have the statutory supersedeas without doing certain things, among which is an undertaking by surety to pay damages as well as costs; but, as Mr. Justice Story says in Martin *vs.* Hunter's Lessee, 1 Wheat., 374, we must not resort to "hypercritical severity in examining the distinct force of words," etc.; therefore, when we construe this language by the light of the law of supersedeas as it applies to courts of chancery especially, we are forced to acknowledge that those courts have not been shorn of their ordinary power to stay proceedings pending an appeal outside of and beyond this statute. I do not break down the act of Congress nor claim a power unrestricted by it, nor forget the abundant rulings on it, from a critical examination of
45 which I have just emerged. But, not to be misunderstood, and confining the ruling to the facts before us here, I affirm that when a court of equity appoints a receiver and by the final decree adjudges the property to belong to one of the parties it may, pending the appeal, continue the receiver or not according to circumstances, and this statute does not affect that power, except so far as it furnishes an analogy as to the terms it may impose upon the parties. The appel-ate court may, beyond question, control the exercise of the power, but still it exists, and, in my judgment, the most important consideration to govern the discretion is that which demands that we save that control of the appellate court which it should always have over the *res* to make its jurisdiction effectual. Just as before the appeal it was within the power of this court. Why should not we do all we ought to transfer the control to the appellate court? If it be equitable to commence the judicial custody, generally it would be equitable to continue it.

If we had not appointed a receiver this property would have been in the hands of the defendants at the final decree; possession would have been decreed to plaintiffs, and could have been enforced under equity rule 9 unless they had perfected the statutory super-
46 sedeas. But the plaintiffs were not content with this, but invoked the extraordinary power of this court to appoint a receiver—extraordinary in its commencement and in its continuance before and since the appeal—and, being extraordinary, it is governed by its own rules as well in relation to a stay of proceedings

pending an appeal as everything else. We suspended the ordinary laws of procedure and oust tenants without ejectment; we allow no man to eject the receiver or to sue him or to tear down the buildings (which power has been invoked in this case as against the city police) without our consent. Why, then, does not this extraordinary procedure of appointing a receiver likewise stretch itself beyond the ordinary law of statutory supersedeas and present some element of its own in that regard? It does, I think.

The result of it is that the most that can be technically claimed by the plaintiffs because of this omission in the bond is that the decree declaring them entitled to the right of property in this real estate has not been suspended as it was intended to be perforce of the statute and the bond; and, as against the defendants, they would be entitled to a writ of assistance to acquire that pos-
47 session which ordinarily belongs to the right of property, but they have themselves defeated that effect by taking the possession of the property from defendants and placing it with this court. On applying here for possession other procedure comes into play, and the fact appears that there has been an appeal, and the question is, Shall the court surrender its possession because there has been no bond under the statute? Generally it ought to do so, because, but for any statutory command to stay its further action on the giving of a proper bond, generally it would do so. 3 Dan'l-Ch'y Prac. (1 Ed.), 105, 110. I mean that whatever restrictions there may be in this statute, if it were out of the way, the court would, notwithstanding an appeal, pass the possession along with the right of property unless some equitable consideration supervened to prevent it. I have already suggested those that should influence this court to withhold that possession in this case, at least temporarily, until the appellate court can be heard from, and, I think, until the appeal is finally heard.

Moreover, if the defendants had given a bond which would have suspended the force of the decree declaring the right of property to be with the plaintiffs, the latter could not have expected the court,
48 in the exercise of its power over receivers pending an appeal, to surrender possession to them; not because the supersedeas deprived the court of its power over the receiver in that behalf, but because, not having the established right of property, they would not be entitled to possession, not any more than they would have been if the final decree had declared the right of property to be with defendants; and certainly, if that had been done, the plaintiffs would not have wished the court, pending appeal, to let the defendants into possession, though the power to do so would have been unquestioned. But the defendants have been deprived of that statutory supersedeas which would have suspended the plaintiffs' right of property as declared by the final decree by a mistake of some one, against which they may equitably ask this court to relieve them by continuing the receiver, pending the appeal, otherwise than through a supersedeas, if it has the power to do so. That it has that power by a direct stay of proceedings for the discharge of the receiver, pending the
49 appeal, I do not doubt. The plaintiffs, if occasion required,

could be relieved against the mistake by a reformation of the contract upon a bill for the purpose. 3 Pom. Eq., 1367; 2 *ibid*, 843, 845, 846, 852, *et seq*; Bish. Eq., 469, 871; Ivinson *vs.* Hutton, 98 U. S., 79; Snell *vs.* Ins. Co., *ibid*, 85; Elliott *vs.* Sackett, 108 U. S., 132; Pickersgill *vs.* Lahens, 15 Wall., 140; State *vs.* Frank, 51 Mo., 98; Craft *vs.* Dickens, 78 Ills., 131.

Let us suppose, for instance, that plaintiffs had not discovered this mistake until after an affirmance of our decree and a suit by them upon the bond, does any one suppose they could not on a bill reform it according to the facts stated here, and would not defendants and their surety be liable for "damages" according to their real intention? Then why is the bond, within the purview of a court of equity, looking at the real facts, any less a supersedeas bond here and now upon the principle of treating that as done which ought to be done? "It is a peculiar excellence in chancery on many occasions that it goes behind writings, and even sealed instruments and judgments, to ascertain how the original transaction stood and what were its true obligations in order to enforce them." U. S. *v.* Price, 9 How., 83, 102. If, therefore, the defendants have been defeated of their intention—and they had the
50 right of absolute choice upon executing the statutory bond, so that it need not be a mutual mistake, since the plaintiffs had no choice as to the terms of the contract—to give a supersedeas bond which would have suspended the plaintiffs' right of property, and, as a consequence of that suspension, any right of possession pending the appeal by mistake relievable in equity in favor of the plaintiffs if they desired it, I do not see any reason why the plaintiffs should not be in a court of equity called on to act in the premises wherever the matter is involved, be left to resort to that remedy, or else compelled to accept the defendants' offer to make the bond complete. Of course, only upon any just terms as to security or indemnity, and that containing the same condition as the statutory bond, would be just, or an amendment of the defective bond to conform to the statute by the consent of the surety would be just and precisely what a court of equity on a bill to reform the contract would grant.

On this reasoning, if it be correct, the right of this court to direct the amendment or a new bond does not depend on any jurisdiction it may have over the instrument *qua* a supersedeas bond, or any authority over the appellate proceedings which might be deemed an usurpation, but only on the fact that, having lawful cus-
51 tody of the *res* and a plenary discretion to allow or refuse a surrender of it to the plaintiffs, on their application to enforce the decree (so far as the decree relates alone to that custody and no further), it may exercise that authority according to the demands of the equitable considerations here suggested, and refuse to deliver possession to the plaintiffs, in spite of their unsuperseded decree, if the defendants shall voluntarily correct the mistake. And it should be remembered here that, by invoking this extraordinary authority of the court over its receivers to continue them or not upon these equitable considerations, we neither create nor re-

store the statutory supersedeas, do not substitute another, nor affect the rights of the plaintiffs growing out of any want of one. We simply and independently, upon our own terms, withhold possession from them until the Supreme Court can act. To show this distinction let us imagine that no supersedeas bond had been given at all, or attempted or intended to be given, but before the receiver was discharged the defendants, by motion or petition, should apply to this court to continue the receiver, or to appoint one originally, pending the appeal, and we should rightfully or wrongfully
52 do that, is it not plain that the plaintiffs' rights of property under the final decree would not be affected by the action of the court? No more are they affected by the action we now take in continuing this receiver.

The only possible fault that occurs to me with this reasoning is that by the final decree we adjudged not only the right of property but also the right of possession—construing the decree as plaintiffs construe it—to them, thereby bringing the possession of the receiver within the influence of the supersedeas law, so that the right to that possession so decreed could only be suspended by command of the statute, and not otherwise. The court and parties certainly intended to surrender the possession along with the right of property decreed unless defendants complied with the statute, but the court did not intend to do so by that decree, and supposed that if the defendants did not give the bond the receiver would first pass his accounts and then surrender the property by some subsequent order to that effect. But this is beside the question and of no importance now, I think; for, being better informed, the court finds it has larger power than it was aware of, and that its continued control does not depend at all upon whether a bond was given or not. I
53 think it is not precluded by the final decree from exercising that larger power.

In other words, it is proposed now to exercise only that power which Mr. Justice Bradley confirms in Hovey *vs.* McDonald, 109 U. S., 150, and Mr. Chief Justice Waite in Leonard *vs.* Ozark Land Co., 115 U. S., 465, and for the exercise of which, so far as it relates to injunctions, the 93d equity rule was established. That rule does not extend to the regulation of the practice in the matter of continuing receivers pending an appeal, but the power is not created by or derived from the rule at all, and exists without it. The court not yet having prescribed any precise regulations in relation to receivers, we are directed by equity rule 90 to the general practice as it existed in 1842, just as the Supreme Court itself is directed by its rule 3 to the practice prior to 1791. This practice, in its relation to receivers, Mr. Daniel briefly summarizes at the last citation above made from that author, and Mr. Justice Bradley in Hovey *vs.* McDonald, *supra.* That case is somewhat complicated, by a reference to the local practice on appeals from special to general term in the District of Columbia, which misled counsel in Leonard *vs.* Ozark Land Co., *supra,* but a careful reading makes it very plain in its application here. I had intended to quote largely from it, but forbear, as nothing
54 less than a careful reading of the whole case will suffice. It

was the case of a receiver, and I regard it as directly in point as to the doctrine to control us here. It shows that the supersedeas of the statute does not suspend the power of the court below as to the receiver pending the appeal any more in a case coming from the circuit court than the one from which that appeal then under discussion came. It is a general principle of our appellate law established as to the effect of an appeal upon an injunction in the Slaughter House Cases, 10 Wall., 273. The only reasonable doubt in its application here, as before suggested, is as to the power of this court after the final decree and the term at which it was rendered, but the 93d equity rule itself recognizes that it then exists as well as before, as it did in England, and does yet, for it directs the judge to exercise it when he "allows" the appeal, which may be after the term at which the final decree was rendered and at any time within the statute of limitations. There is no reason why the court may not exercise it at any time, particularly since Goddard *vs.* Ordway, 94 U. S., 672, decides that it is the duty of the court below, notwithstanding an appeal, to give the necessary orders to preserve the property in the hands of the receiver pending the appeal whenever it remains in its possession.

55 Now, applying the doctrine here, and it appears that the final decree directed the possession of the receiver to be delivered to the plaintiffs, as already explained, it was not thereby intended to determine that pending the appeal they should have possession. As to that no special directions were given, as ought to have been done; but, as a fact, it was supposed that a supersedeas bond would be necessary to continue the receiver pending the appeal. It was further supposed that a supersedeas bond had been given, and, in fact, the receiver has been continued without any special instructions to that effect. A bond intended to be a supersedeas, but omitting the operative words, was filed, and the proof shows that the omission was by mistake. But this mistake, under the doctrine we are considering, is beside the question, because if there had been a good bond it would not have superseded the directions of the final decree concerning the receiver, be they what they may, and, of course, a defective bond could have no effect in that direction. In Hovey *vs.* McDonald, *supra*, the directions to the receiver were to deliver the fund, and they were not in the decree at first, but the Supreme Court sanctioned the insertion of them by amendment, saying, however, that "it was merely expressing

56 the legal effect and consequence of the decree." So here the directions given merely expressed the legal effect of the decree without them.

The plaintiffs were as much entitled to the possession then as now, and no more now by reason of the mistake than they would be now without it. Wherefore, when they ask us to discharge the receiver, we consider the application independently of the mistake, and I think, for reasons stated, the court should retain its control pending the appeal, at least until the Supreme Court directs otherwise; and I should make the same ruling precisely if the defendants had appealed intentionally without a supersedeas, as I understand the law,

though at the time the appeal was granted I thought, as we all did, that a supersedeas was absolutely necessary to effectuate that result. Draw a broad line between the right of property of the plaintiffs, whether they claim under the original title or the final decree, and the right of possession, which has been in fact, but not in law, severed from it by the appointment of a receiver, and we have two entirely distinct things; as to one of which the defective bond may be important, but as to the other it seems not to be; and if we keep these two things apart and do not confuse them the case be-
57 comes clearer as to existing rights of the parties in this application; and in this connection it is useful to distinguish between that continuance of the receiver which would have necessarily resulted from a suspension of plaintiff's right of property by a supersedeas of the final decree in their favor and that continuance of the receiver which comes of the present action of the court. In the one the plaintiff's possession would have been arrested by the suspension of his right of property; in the other it is arrested regardless of such suspension, and rightly, on the facts of this case.

I do not know why in this case any terms should be imposed. We imposed none on the plaintiffs as a condition for appointing a receiver in the first instance, and, considering that the Supreme Court may disagree with us as to the right of property, there is no apparent reason for imposing any on defendants for continuing a custody that protects all alike till the end of the appeal. At all events, the same bond that the statute requires would by analogy be sufficient here. There would often be circumstances when the court should not continue the receiver at all or only on terms indicated by the peculiarities of the case; but I recognize no such circumstances here, and think, on the whole, no terms ought to be
58 imposed, except that the defendants have leave and be required to carry out the original design by inserting the omitted words, with the consent of the surety, if he will consent; or, if not, to file a new bond with the omitted condition supplied and a superadded stipulation that it shall operate retrospectively to cover all "damages" from the date of the appeal. Perhaps, as these conditions are somewhat logically inapplicable to the views above expressed, and if any terms are to be imposed they should be such as the court would require independently of the mistake that has been made and of the statutory requirements for a supersedeas, they should not be demanded. But the defendants move to amend the bond or to file another, and are willing to do so, and, as I see no occasion on the facts of this case to impose any independent conditions for the continuance of the receiver, I see no harm in permitting them to complete the bond according to the original design, so that if plaintiffs are entitled to any benefit of it they can have it in such form of bond as it ought originally to have been. They cannot object to this, and it does not, if we have no power to do that here, injure them in the least nor impose a supersedeas, if
59 none already exists. This disposes of the motions quite satisfactorily to my own judgment.

But, while I am not now required to go further, I should be pre-

pared to rule, if necessary, but with great diffidence as to the correctness of the conclusion, in view of the sinuosities of our American law in relation to the implied appellate supersedeas, that this court has the power to direct the amendment of a writ of error or appeal bond and to permit the amendment asked for here as a part of the proceedings of this court under the authority of Revised Statutes, section 954. I have not the least doubt it could be done in England, particularly in chancery, but through the influence of statutes and the distorted growth of an American notion that an appeal transfers a case bodily into the appellate court and strips the court below of all power over the record and the case, I am not certain that the power could be sustained here, though there is no adjudication of the Supreme Court of the United States against it, whatever may be said of expressions to be found in the opinions. Experimentally, I will permit the amendment *pro forma*, and not undertake to justify it now, since I find it unnecessary, but will cite in a note to this opinion some authorities which seem to sus-
60 tain it. It is not a practical question of much value in a situation precisely like this, because the case of Lenard *vs.* Comeau, 102 U. S., 161, and other cases like it furnish a complete remedy in the Supreme Court itself for the correction of the mistake made, and if the position first assumed in this opinion be correct the receiver would be continued independently of the statutory supersedeas, and that would give the defendants relief until the Supreme Court could act to correct the bond.

Motions of plaintiffs denied.

Motion of defendants granted.

Note.

1. Amendment of the bond. Rafael *v.* Verelst, 2 W. Bl., 1067; S. C., 2 Cowp., 425: There were two defendants, with verdict against one and in favor of the other. Writ of error joined both, as did the bail in error, which was by recognizance; motion in the appellate court to amend the writ granted; same day *fi. fa.* issued and levied, although plaintiff in error offered to alter the recognizance; motion in court below to quash *fi. fa.* and to amend the recognizance granted, and bail in error entered into a new recognizance. In Justice *vs.*
Mersey Steel Co., 1 C. P. D., 575, the old practice of giving
61 bail in error on appeal to House of Lords being still in force, the defendants in error, not knowing that, put in no bail; *fi. fa.* issued; application to appellate court to extend time and stay execution pending appeal; held, application should be made to the court below.

Attorney Gen'l *vs.* Swansea, etc., 9 Ch. D., 46: Practice now in England that in equity cases application to stay proceedings for any cause pending appeal should be made to the court below in the first instance, and, if refused, then to appellate court by "motion by way of the appeal." But see Wilson *v.* Church, 11 Ch. D., 576, S. C.; 12 *ibid*, 432.

That a bail bond could always have been amended. See 1 Bac. Abridg., 567; title, "Bail on Civil Cases," D. 4; Hampton *v.* Courtney,

Cro. Jac., 272; Anderson *v.* Noah, 1 B. & P., 31, and numerous other common-law authorities.

In the chancery practice of England there was no difficulty, for, if the stay of proceedings was granted below, of course the terms as to security bonds, etc., were all in the control of that court; but if by the House of Lords, then, of course, in the control of that court, and in both the proceedings were subject to amendment as liberally as proceedings in chancery always were, but the application had to be made to the court in which the stay had been
62 obtained. The only difficulty in our practice is in determining to which court the bond belongs, or in which the proceedings for stay may be said to be taken, for, unlike a writ of error at law, the appeal is granted below, but while the bond is taken below in both in neither is the supersedeas directly and expressly ordered, as it always is in chancery in England, but comes by an implication from the statute, addressed alike to both the appel-ate court and the court below. 2 Dan'l- Ch'y Prac. (1 Ed.) 675; 3 *ibid*, 105, 109, 134, 136, 140, and 97–150, generally; 2 *ibid* (3 Ed.), 1467.

In Arnold *vs.* Frost, 9 Ben., 267, Blatchford, J., held that an appeal bond was so much a part of the suit in which it is given that an action on it might be maintained in the same court where given as ancillary to the original suit on a question of jurisdiction.

In Tipton *v.* Cordova, 1 N. Mex., 383, an appeal bond was held to be "process" under the internal revenue act and, as such, required a stamp.

In Bentley *v.* Jones, 8 Oregon, 47, it was held that the appeal bond was not properly a part of the transcript in the appellate court on an appeal from the judgment made upon a motion to quash a *fi. fa.*, but belonged to the files in the court below, etc.

In Martin *vs.* Hunter's Lessee, 1 Wheat., 304, 361, it was
63 said: "But there is nothing in the record by which we can judiciously know whether a bond has been taken or not, for the statute does not require the bond to be returned to this court, and it might, with equal propriety, be lodged in the court below," &c.

In Irwin *v.* Bellfontaine Bank, 6 Ohio St., 81, it was held under a statute almost identical with our U. S. Rev. Stats., sec. 954, that an appeal bond is a "proceeding," and as such amendable. Therefore the appellate court allowed the defective bond to be amended, with consent of the surety, or a new one to be filed.

In Williams *v.* McConnico, 25 Ala., 538, the bond appeared to have been approved after the appeal, but on affidavit the court sent a certiorari to the judge below to certify when it was in fact approved, and would not dismiss the appeal until the truth was made known.

In Dobbins *v.* Dollarhide, 15 Cal., 374, Field, C. J., held that if the appeal bond do not operate as a stay the remedy is by motion in the court below for leave to proceed notwithstanding the appeal, and not to dismiss the appeal.

In Schenck *v.* Conover, 2 Beasley (Ch'y), 13 N. J., Eq., 31, it is distinctly stated that outside of a rule of court regulating the supersedeas, very much as our Revised Statutes do, a court of equity may

interpose to protect the parties pending an appeal and stay
64 or allow the decree to be executed according to circumstances; and so in Grainger *vs.* Craig, 85 N. Y., 619, that the statutory supersedeas was not the entire reliance of the appellant, but the court below might stay proceedings when equitable to do so. Abundant authority could be cited to this point, but care should be taken not to abrogate the statutory requirement for a supersedeas bond, though this power has always existed since 13 Jac., 1 Ch., 8, qualified the absolutely suspensive effect of a writ of error, and the danger of trenching on the statute is not great. Our act as to this statutory supersedeas assimilates appeals to writs of error at law, and certainly a court of equity can exercise the same discretion as did a court of law under the statute of James, and the books are full of cases where the court has refused to issue execution pending error upon considerations extraneous to the four corners of the bond. But a court of equity essentially has a larger power growing out of its control over appeals in this matter of staying further proceedings; and when our original act, requiring a decree in equity to be reviewed only by writ of error, was repealed, and the appeal substituted therefor, presumably Congress intended to remove the restrictions imposed by the anomaly of a writ of error in equity upon that larger power, both as to the authority of the appellate court
65 and the court of original cognizance.

When, therefore, the statute invests the court of original cognizance with the power to grant an appeal and leaves it to exercise the usual powers in that behalf, among them was that to stay proceedings pending the appeal in all those circumstances where before it could have been done if not forbidden by the statute or fairly not forbidden by implication from it; and, necessarily, when it is called upon to take a bond that "proceeding," like the rest, must be liable to amendment under Revised Statutes, sec. 954, if the jurisdiction of the court be subsequently invoked to rule upon that bond and the circumstances surrounding its existence, as it must if the court be applied to for the execution of the decree, notwithstanding the appeal. Our equity rule 85 recognizes this power of amendment even of decrees, and I see no reason why under the general power existing outside that rule it may not amend an appeal bond, at least for its own purposes of procedure in delaying execution of the decree until the appellate court issues its mandate in the premises, whether the supreme court recognizes that amendment as sufficient for its purposes of procedure on the appeal or not.

66 And, finally, I think section 954 of the Revised Statutes gives the party a right to such an amendment before the court can take advantage of the mistake and executes the decree to the defeat, perhaps, of the appellate control of the litigation. Authorities are in almost every volume of reports and text writers prescribing the reasonable and intelligent conditions under which such amendments should be allowed or refused, whether in the one court or the other.

E. S. H.

67 THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee:

I, John B. Clough, clerk of the circuit court of the United States for said western district of Tennessee, do hereby certify that the papers hereto attached are full, true, perfect, and correct copies of the originals and of the entire record and proceedings since and including the final decree entered August 1, A. D. 1885, & of the last opinion in said court, as the same now appear of record and upon the files in my office, in the following cause, to wit: William Ferguson *et al. vs.* George G. Dent *et al.* No. 372.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, Tennessee, this 21st day of October, A. D. 1886, and of the Independence of the United States the 111th year.

{ Seal of the Circuit Court of the United States for the District of West Tennessee. }

JOHN B. CLOUGH, *Clerk.*

[Endorsed:] No. 372. Circuit court of the United States, western district of Tennessee. William Ferguson and others *vs.* George G. Dent and others.

Endorsed on cover: W. Tennessee C. C. U. S. No. 1297. William Ferguson, Isaac A. Ferguson, E. E. Ferguson, William H. Ferguson, Albert L. Ferguson, Ann J. Ferguson, Elimer C. Ferguson, R. S. Jacoby, Cassie Jacoby, Sarah Barbour, and A. G. Barbour, appellants, *vs.* George G. Dent, James E. Dillard, Thomas Buchanan, H. Buchanan, John Johnson, William Barbour, R. A. Parker, The De Soto Building & Loan Association of Memphis, Tennessee; Susan R. Hooper *et al.* Filed November 23, 1886.

MAR 4 1887
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES,

WASHINGTON, D. C.

WILLIAM FERGUSON, ET AL.,

vs. } No. 1297.

GEORGE G. DENT, ET AL.

BRIEF OF T. B. EDGINGTON,

OF COUNSEL FOR PLAINTIFFS,

ON MOTION TO DISCHARGE AND VACATE SUPERSEDEAS, AND TO REVOKE ORDER REINSTATING RECEIVER, AND FOR WRIT OF RESTITUTION OF THE PROPERTY, WHICH HAD BEEN DELIVERED TO PLAINTIFFS BY THE MARSHAL WHO EXECUTED THE WRIT OF POSSESSION.

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1887.

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The main case under the above title, of which this case is a a branch, came to this court by the appeal of the defendant from a decree pronounced at the May term, 1885, of the Circuit Court for the Western District of Tennessee, to the October term, 1885, of this court. This decree was entered on the first day of August, 1885.

See the decree, page 1 of this record.

The appellants executed an appeal bond for costs only, and *not for costs and damages*, with M. L. Bacon as surety, on the 28th day of September, 1885.

See the appeal bond, pages 5 and 6.

The main case is still pending here. It is No. 900, of the October term, 1886.

The said bond not being a supersedeas bond, because it was not given for *damages* as well as costs, a writ of possession was issued by the clerk on the 23d day of April, 1886, as provided by the decree, and the writ was executed by the marshal by dispossessing the receiver's tenants and by placing the plaintiffs in possession of the property.

W. A. Wheatley, the receiver, relinquished the property to plaintiffs, in obedience to the writ.

See the writ of possession and return of the marshal on said writ, and the receipt by plaintiff's solicitor to the marshal, for the property, on pages 8, 9 and 10 of the record.

On the 26th day of April, 1886, three days after the plaintiffs had been placed in peaceable possession of the property by the marshal, the district judge, "*sua sponte*," to use his own language, entered of record the following order and issued the following writ, which was served by M. Whitlow, special deputy marshal, as seen from his return :

William Ferguson et al., Plaintiffs,
vs.
George G. Dent et al., Defendants. } No. 372.

It appearing in this case that since the adjournment of the court, and in the absence of any judge thereof from the district, and on application to the clerk, that official assumed to issue a writ of possession to dispossess the receiver of this court from the possession of the property in controversy, and that by virtue of such pretended writ the said receiver has been put out of possession thereof, it is now ordered that all the actings and doings of the marshal under said pretended writ be, and and the same are hereby, vacated and annulled, and the possession of the receiver restored, as if said dispossession had never taken place. The clerk will issue a copy of this order to the receiver and to the marshal, who will serve it upon all persons in possession or claiming possession under said pretended writ, and replace the said receiver in possession, as of his former authority.

Circuit Court of the United States, Western District of Tennessee.

William Ferguson et al.,
vs.
George G. Dent et al. } No. 372.

It appearing in this case that since the adjournment of this court and in the absence of any judge thereof from the district, and on application to the clerk, that official assumed to issue a

writ of possession to dispossess the receiver of this court from the possession of the property in controversy, and that by virtue of said pretended writ the said receiver has been put out of possession thereof, it is now ordered that all the actings and doings of the marshal under said pretended writ be, and the same are hereby, vacated and annulled, and the possession of the receiver restored, as if said dispossession had never taken place. The clerk will issue a copy of this order to the receiver and to the marshal, who will serve it upon all persons in possession or claiming possession under the said pretended writ, and replace the said receiver in possession, as of his former authority.

April 26th, 1886. E. S. HAMMOND, Judge.

To the Clerk:

Enter the foregoing order, and issue copies as directed.

E. S. HAMMOND.

MARSHAL'S RETURN OF ABOVE.

On this 26th day of April, A. D. 1886, and in obedience to the within order, I served (a) true copy hereof on W. A. Wheatley, receiver, and also took him around and put him in complete posession of the property herein, from which he had been dispossessed.

JAMES H. FREEMAN, U. S. Marshal.
By M. WHITLOW, Special Deputy.

On the 22d day of May, 1886, plaintiffs made the following motion in the cause:

William Ferguson et al., Plaintiffs,
vs.
George G. Dent et al., Defendants. } No. 372.

Came the plaintiffs and moved the court for an order discharging the receiver and requiring him to turn over the property to plaintiffs, and for a writ of possession or writ of assistance to place plaintiffs in possession, and for an order of this court vacating its former order reinstating the receiver, and for

an order to restore the posession of the property to plaintiffs, which said motions were by the court ordered to be continued over to the next term of this court for hearing.

Certain affidavits were then filed, as seen in the record, and on the 30th day of September, 1886, the district judge made an order for M. L. Bacon, the surety, to consent to the amendment of the bond, by inserting the words *and damages*, which Bacon refused to agree to, and the court thereupon made an order for a new bond, with J. H. Malone and W. H. Robinson as sureties, which new bond was, by said order, to operate as a supersedeas in all respects as if given within sixty days from the date of the decree appealed from.

See record, pages 16, 17 and 18.

Plaintiffs appealed from this order and from the order of April 26th, 1886. See record, pages 16 and 17.

The writ of possession thus attempted to be superseded, after it had been *fully executed*, was issued by the clerk in obedience to the requirements and commands of the final decree of August 1st, 1885, seen on pages 1, 2, 3 and 4 of this record. Said decree adjudges the property to belong to plaintiffs, and among other things contains the following provisions, to-wit:

"The receiver will turn over the possession of the property "to the plaintiffs in this cause. A writ of possession will "issue in favor of the plaintiffs and against the defendants and "against W. A. Wheatley, receiver, and all his tenants, or the "tenants of said defendants, or any of them, and all persons "whatsoever, to place the plaintiffs in the peaceable and quiet "possession of said property, against all the defendants, and "said receiver and his tenants, or other parties or persons. The "receiver will file and settle his accounts with the master of his "court, and make his settlement preparatory to his discharge."

This order replacing the receiver was not only made after the decree had been *fully executed* by the marshal under the writ of possession, but the order of reseizure of the property from plaintiff was made at the *next term* after the decree was rendered and the appeal was taken and perfected.

The errors complained of are stated thus:

1st. The decree having been *executed* under the writ of possession by the marshal, neither the Circuit Court nor this court has the jurisdiction to supersede it.

2d. The Circuit Court had no jurisdiction to supersede the writ and take the property from plaintiffs and restore it to the receiver the *next term* after the decree had been rendered and the appeal had been perfected.

3d. The Circuit Court had no jurisdiction to order and accept an amended bond at the second term after the decree had been rendered and the appeal taken, so as to make it operate as a supersedeas.

These propositions need only to be stated to show the want of jurisdiction of the Circuit Court.

Where the writ of possession has been executed the object of the suit is fully satisfied, and being so satisfied it is *functus officio*, and can therefore support no further writ or proceeding.

If the officer has made his return upon the writ, showing its due execution, and thus establishing by the record the existence of its satisfaction, the objection will prevail and compel the plaintiff to resort to another action, even where the property had been retaken from the plaintiff.

Freeman on Executions, section 477.
Weatherford vs. Cunningham, 4 Dana, 78.
Fowler vs. Currie, 2 Dana, 52 and 53.
Mayo vs. Chiles, 3 Monr., 258 and 259.
Dent vs. Simmons, 7 J. J. Marshall, 42.
Wilson vs. Chanton, 6 L. T. N. S., 255.
United States vs. Slaymaker, 4 Wash. C. C., 169.

A party may take peaceable possession under his judgment without execution. In such case he is as much protected as if he had been put in by a writ of possession.

Hinton vs. McNeil, 5 Ohio, 500.
Jackson vs. Haviland, 13 John, 226.

No supersedeas could be granted by the Supreme Court after the writ sought to be superseded has been executed, when the writ was issued and executed within sixty days from

the date of the rendition of the judgment. Much less could the Circuit Court grant a supersedeas after the judgment had been executed.

Board vs. Garman, 19 Wall., 662.

In Board vs. Garman, 19 Wall., 664, this court, the Chief Justice rendering the opinion of the court, says:

"Such a supersedeas, however, stays proceedings only from "the filing of the bond. It prevents further proceedings under "an execution which has been issued, but does not interfere "with what has been done."

"The writ of error operated as a supersedeas only from such "filing.

"That was too late to prevent the removal of Davis from his "office in pursuance to the judgment; and we cannot now order "him to be restored."

After the allowance of an appeal, the question of the sufficiency of the security becomes cognizable in the Supreme Court.

Rubber Company vs. Goodyear, 6 Wall., 153.

A judge of the Supreme Court is the proper party to apply to for a supersedeas after the expiration of sixty days.

United States Statutes, 1007.

A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with.

Sage vs. Central Railroad Company, 93 U. S., 417.

In the Rubber Company vs. Goodyear, 6 Wall., 156, the court says:

"In equity cases the appellate jurisdiction of the court attaches upon the allowance of the appeal."

Again the court further says:

"The question of the sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal, this question as well as every other in the cause, becomes cognizable here."

The remedy of defendants, if any remedy now exists, is in the Supreme Court.

Seymour vs. Freer, 5 Wall, 822.
Brobost vs. Brobost, 2 Wall., 96.

The following authorities show that no order of decree can be made in the court below while the case is in the appellate court :

A decree rendered subsequently to the appeal is a mere nullity. The case was in the Supreme Court, and the Circuit Court had lost all jurisdiction over it.

Slaughterhouse cases, 10 Wall., 273.
Suggs vs. Suggs, 1 Overton, 2, 3, and Coofees note.
Nichols vs. Colville, 1 Overton, 82.
Staggs vs. State, 3 Hum., 372.
Bank vs. Berry, 3 Hum., 590.
Farber vs. Carter, 2 Sneed, 1.
Dossett vs. Miller, 3 Sneed, 72.
Maskall vs. Maskall, 3 Sneed, 208 ; 2 Hum., 106.

" The appeal of either complainant or defendant takes the *whole* case to the Supreme Court to be heard *de novo.*"

Carnes vs Polk, 5 Heisk, 245.

Where the appeal bond was not in double the amount of the judgment and costs, the case was dismissed in the appellate court.

Hubble vs. Renick, 1 Ohio Statutes, 171-7.

In Oliver vs. Pray, the Supreme Court dismissed the case because the party failed to give a sufficient appeal bond. Appellant filed his bill in equity, and obtained the relief.

Oliver vs. Pray, 4 Ohio, 175.

The question as to what would be the regular mode in which a receiver should be discharged, has nothing to do with this controversy.

Although the final decree has been pronounced, and the property controlled by the receiver has passed from his tenants into the possession of the plaintiffs under and by virtue of the execution of a writ of possession, yet the receiver is still an officer of the court until formally discharged on the settlement of his accounts.

High on Receivers, sections 833 and 834.

The receiver's *functions*, however, usually terminate with the termination of the litigation in which he was appointed.

High on Receivers, section 833.

Field vs. Jones, 11 Ga., 413.

The receiver's functions had ceased. He no longer had control of the property because the writ of possession had been executed by the marshal and plaintiffs were in the peaceable possession of the property, by having been placed in possession by the marshal under the writ. See the writ of possession and the return of the marshal, and the receipt to the marshal by plaintiff's solicitor for the property.

See Record, pages 8, 9 and 10.

It is not contended that the bond given was a supersedeas bond within the meaning of section 1000 of the Revised Statutes, which reads as follows:

"Sec. 1000. Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

The only pretense is that the words "*and damages*" that would make the bond a supersedeas were omitted by mistake.

Bacon, the surety, at least made no mistake, as he knows his rights, and refuses to permit the bond to be amended.

See Record, page 16.

There are strong internal evidences tending to show that no mistake was in fact made, and if it was intended to "operate as a supersedeas," yet it was not intended that Bacon should have imposed on *him* any of the liabilities that would attach to a supersedeas bond.

One of these internal evidences tending to show that defendants gave precisely such bond as they intended to give, can be

seen from the order of the Circuit Court approving the bond, on page 7 of the record, in these words, to-wit :

William Ferguson et al., Plaintiffs,
vs.
George D. Dent et al., Defendants. } No. 372.

In this cause, on this 28th of September, 1885, came solicitors for defendants, and in open court prayed an *appeal* from the final decree herein, which was granted, they having presented their *bond for appeal*, signed by George G. Dent, Henry G. Dent, Sarah L. Dent, Susan Dent, C. W. Frazer, Mary E. Dent, by George G. Dent, their guardian *ad litem*, and Susan R. Hooper, W. G. Hooper, Thomas Buchanan and H. Buchanan by G. G. Dent, attorney, and J. E. Dillard and M. L. Bacon, sureties on said bond; and the court having examined said bond and found the same executed according to law, and being satisfied with the solvency of the sureties, and having ordered citation, now here approves said bond, and orders same to be filed herein as the *appeal bond* of said defendants, and the record sent up to the Supreme Court of the United States, at the October term, 1885, being the second Monday and 12th day.

Here it is twice referred to in the order as an appeal bond simply, and nowhere as a supersedeas.

The bond was made up under the immediate supervision of George G. Dent, Esq., who has had the principal management of the case in the Circuit Court, and he makes no claim, as this record shows, that the bond originally given is different from the one intended.

See the statement of deputy clerk W. B. Weisiger, on page 13 of the record, showing that Dent was present when he filled up a new blank bond in the precise language of the old office-worn bond in Col. Frazer's handwriting.

Weisiger says he attempted to make a true and correct copy of the bond filled out by Col. Frazer, and he believes he did so, and he is satisfied the word "damages" was not in the paper he copied from.

It is immaterial, however, if the operative words "*and damages*" were left out of the bond by mistake or not.

They were left out, and the bond was not a supersedeas bond, and the surety was not liable for damages, and the court could not under the circumstances make it a supersedeas. Until the writ was executed the defendants could have applied to this court for a supersedeas, but they neglected to avail themselves of this remedy which was the *only* remedy they had.

In all doubtful cases in courts not of final resort, where an appeal lies, the court should solve all reasonable doubtful questions of jurisdiction against the exercise of the jurisdiction.

Cooly on Torts, page 420, says :

" The inferior officer is not excused for exceeding his jurisdiction, because, a limited authority only having been conferred upon him, he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review. The rule of law, therefore, which compels him to keep within his jurisdiction at his peril, cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty in doing so. Moreover, in doing so, he keeps within the presumptions of law, for these are always against the rightfulness of any authority in an inferior court which under the law appears doubtful."

The next question open for discussion is whether or not this is such an order as may be appealed from, and such as the Supreme Court will consider. The entire record of this case is in the Supreme Court on the appeal of the defendants in the court below, except such part of the record as has been made up since that appeal upon the issue here presented, touching the issuance of the writ of possession, and an execution and an order of the court restoring the receiver.

The case of the Railroad Company vs. Soutter, 2 Wall., 510, is a parallel case to the present one. That case had previously gone to the Supreme Court on appeal, and when the mandate of the court was received below and the account of the receiver was being stated, one of the parties moved for leave to pay off

the mortgage debt in court and discharge the receiver, which was refused, from which order an appeal was taken, and the order of the lower court was reversed.

In the opinion by Justice Miller, in that case, the court says:

"The only doubt which the court could have on the question arises from the principle that the appointment and discharge of a receiver are ordinary matters of discretion in the Circuit Court, with which this court will not interfere."

"As a general rule, this proposition is not denied. But we do not think it applicable in the case before us.

"While the parties to this suit were fiercely litigating the amount of the mortgage debt, and questions of fraud in the origin of that debt, the appointment or the discharge of a receiver for the mortgaged property very properly belongs to the discretion of the court in which the litigation was pending. But when those questions had been passed upon by the Circuit Court, and by this court also on appeal, and the amount of the debt definitely fixed by this court, the right of the defendant to pay that sum and have a restoration of his property by discharge of the receiver, is clear, and does not depend on the discretion of the Circuit Court. It is a right which the party can claim; and if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withold it. A refusal is error—judicial error—which this court is bound to correct when the matter, as in this instance, is fairly before it. That the order asked for by appellants should have been granted seems to us very clear."

The present case is a much stronger one for relief than Railroad vs. Soutter, 2 Wall., 510, because the case at bar is *pending* at the present time in this court, and the action of the court below is an encroachment on the powers and rights of this court.

The proceedings are in contempt of this court, where the litigation is pending. The order of the circuit judge reinstating the receiver was *coram non judice* and void.

The receiver is a mere trespasser, acting under the illegal and void orders of the court, which has no jurisdiction to place him again in possession.

We have no remedy at law or in equity, except to apply to this court.

If the *defendants* had been put in possession by the void orders of the court, we would doubtless have had some other remedy.

Here, however, is a case where the property is placed *in custodia legis* in the hands of the *receiver* by the void orders of the district judge, in a cause that is pending in *this* court on the appeal of the defendants.

It is a singular and manifest error on the part of the district judge to suppose that the clerk could not issue a writ of possession, in strict accordance with the decree, in his absence from the city.

See pages 11 and 12.

It is likewise a noteworthy fact that it did not occur to the learned judge that the decree could not be *superseded* after it had been *executed*. His opinion is silent on this leading and important question, and the doctrine laid down in the case of Board vs. Gorman, 19 Wall., 662, is not even referred to.

The writ of possession was a proper writ in a chancery proceeding, and is so recognized by this court in an opinion by Chief Justice Marshal, in Wallen vs. Williams, 7 Cranch, 278.

The receiver's tenants could be ejected by no other process. As for the receiver himself in this cause, he has simply, as he was bound to do, acquiesced in the decrees and processes of the court, and he has made no objections to what was done, and makes none. He rightfully and intelligently acquiesced in the change of possession.

Moreover, the district judge has produced no authority that would warrant him in taking an amended bond after adjournment of the term at which the decree was rendered and the appeal taken, so as to supersede the writ of possession *before* it had been executed.

The writ of supersedeas issues theoretically and practically from the Supreme Court, upon the compliance with certain conditions by the appellants.

No power is lodged in the Circuit Court to grant such a writ.

The supersedeas is exclusively a Supreme Court writ. It is true it arises *ipso facto* on the appellants complying with certain statutory conditions, but it nevertheless issues as an exercise of appellate power *by* the Supreme Court. The appeal is a matter of right which the Circuit Court cannot refuse.

United States vs. Curry, 6 How., 106.

The district judge takes and approves the bond, and if he refuses to accept a supersedeas bond, a justice of this court will approve the bond and issue the supersedeas.

Sage vs. Railroad Company, 96 U. S., 712.

The Supreme Court even cannot issue the writ of supersedeas to stay the proceedings on the judgment of an inferior court, upon the ground that a writ of error or appeal is pending, unless the writ of error was sued out, or the appeal taken within the prescribed time after the entry of the judgment or decree.

Adams vs. Law, 16 How , 144.
Saltmarsh vs. Tuthil, 12 How., 387.
Hagan vs. Ross, 11 How., 294.
Wallen vs. Williams, 7 Cranch, 279.

In Saltmarsh vs. Tuthill, 12 How , 389, Chief Justice Toney, in delivering the opinion of the court, says:

"Nor is there any equitable power in the Circuit Court to stay the execution, upon the ground that a mistake as to the manner or time of removing the cause was committed. And it is immaterial in this respect whether it was the mistake of the party or the court.

"For this court has never deemed the tribunals of the United States authorized to dispense with the acts of Congress, regulating appeals and writs of error upon any equitable ground."

The old law requiring the supersedeas to issue within ten days was modified by the Revised Statutes so as to extend the time to sixty days, but in all other respects the old law is in force.

In Kitchen vs. Randolph, 93 U. S., 86, Chief Justice Waite rendering the opinion of the court, says:

"We are therefore of the opinion that under the law as it now stands, the service of a writ of error, or the perfection of an appeal within sixty days, Sundays exclusive, after the rendering of the judgment, or the passing of the decree complained of, is an indispensable prerequiste to a *supersedeas*, and that it is not within the power of a justice or judge of the appellate court to grant a stay of process on the judgment or decree, if this has not been done."

If any mistake was made it was not the fault of the district judge, as he clearly shows on page 21 of this record.

It is therefore clear that the Circuit Court after the expiration of sixty days and at a subsequent term, could not supersede one of its own final decrees either *before* or *after* the execution of the same.

T. B. EDGINGTON,
Solicitor for Plaintiffs.

IN THE SUPREME COURT OF THE UNITED STATES.

WASHINGTON, D. C.

WILLIAM FERGUSON ET AL.,

vs. } No. 1297.

GEORGE G. DENT ET AL.

To Messrs. Poston & Poston, Solicitors for defendants:

You are hereby notified that on Monday, the 21st day of March, 1887, in the Supreme Court of the United States, at Washington, D. C., I will take up and try the motion to discharge and vacate the supersedeas in this cause, and to revoke the order reinstating the receiver, and for a writ of restitution of the property, which had been delivered to plaintiffs by the Marshal who executed the writ of possession herein. I herewith serve you with a printed copy of my brief on said motion.

T. B. EDGINGTON,
Solicitor for Plaintiffs.

MEMPHIS, TENN., February 23, 1887.

Service of the foregoing notice and printed copy of brief is hereby acknowledged.

POSTON & POSTON,
D. H. POSTON.

Office Supreme Court U. S.
FILED.
MAR 19 1887
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States

No. 1297—OCTOBER TERM, 1886.

WILLIAM FERGUSON ET AL.

versus

GEORGE G. DENT ET AL.

BRIEF OF D. H. POSTON AND L. W. FINLAY,

Of Counsel for Defendants,

IN OPPOSITION TO THE MOTION OF THE PLAINTIFFS TO VACATE AND DISCHARGE THE *Supersedeas*, AND TO REVOKE THE ORDER REINSTATING THE RECEIVER AND FOR A WRIT OF RESTITUTION OF THE PROPERTY.

S. C. TOOF & CO. PRS. & LITHS., MEMPHIS

In Supreme Court of the United States.

No. 1297—OCTOBER TERM, 1886.

WILLIAM FERGUSON ET AL.
versus
GEORGE G. DENT ET AL.

BRIEF OF D. H. POSTON AND L. W. FINLAY,

Of Counsel for Defendants,

IN OPPOSITION TO THE MOTION OF THE PLAINTIFFS TO VACATE AND DISCHARGE THE *Supersedeas*, AND TO REVOKE THE ORDER REINSTATING THE RECEIVER AND FOR A WRIT OF RESTITUTION OF THE PROPERTY.

The whole question involved herein arises upon the action of the court found on page 11 of the record, wherein it recalled the writ of possession that had been issued improvidently and without authority, dispossessing the receiver who had been appointed to preserve the property pending the litigation, and ordering the property to be restored to the possession of the receiver, the plaintiffs contending that such action was unauthorized and beyond the powers of the court, for the reason that the final decree on page 1 of the record expressly adjudged such final process to issue, and although defendants took a broad appeal, yet they only gave an appeal bond which operated as a writ of error without a *supersedeas*, and they had the right to all final process, including a writ of possession to oust

the tenants of the receiver and the receiver himself in the possession of the property.

And secondly, that having had the final process issued and executed before any attempt (if such could be done) to execute a proper *supersedeas bond*, that it is and was beyond the power of the court to recall such process or award a writ of restitution.

Neither the order appointing the receiver, nor the scope of the duties imposed upon him, nor the condition of the title, or the possession of the property at the date of his appointment, or the purport of the pleadings are before the court in this printed record. The court is therefore in no condition to pass upon or review the action of the court below, and say whether its action was proper or otherwise.

But assuming that the appointment of the receiver was for the preservation and protection of the property during the litigation, and conceding that no *supersedeas* was obtained, but that an appeal was taken, and is now pending in the court, can, or should this court interfere with the action of the court, and vacate its order restoring the receiver to the possession of the property, to hold the same pending the litigation?

We say not.

As a general rule an appeal does not abrogate the powers or functions of a receiver.

Swing v. Townsend, 24 Ohio St. R. p. 1.

Pending a litigation over property, if it is put in possession of a receiver who is vested with the usual powers of

such officers, and the defendant appeals from the final decree of the court below, in such a case he will not be ousted, but will retain possession, notwithstanding the appeal.

High on Injunctions, sec. 161.

Shenck vs. Peay, 1 Dillon C. C. R. 267.

In the last case a receiver was put into possession of the property, with the usual directions. On the rendition of the decree, which amongst other things, required the receiver to turn over the property and rents to Peay, the complainant in the cross-bill and defendants prayed an appeal and gave a *supersedeas bond.*

On a subsequent day defendants Shenck & Blers, by their solicitors, moved for an order directing the receiver to turn over to them the possession of the property and the rents in his hands, on the ground that a party who appeals and files a *supersedeas bond* is thereby entitled to have delivered to him any moneys or property in the hands of a receiver, or in the custody of the court. * *

Caldwell Dertnet, J., on p. 270, says, "The motion is "overruled. The *supersedeas* was only intended to cover "the actual present liability of the defendants under the "decree. Even if the bond was in a penalty equal to the "value of all the rents, past, present, and prospective, it "could not have any other effect than to stay the active "operation of the decree, and would not entitle the defend-"ants to the active interposition of the court in their "behalf, and the revocation of orders existing at the date "of the decree, and to the custody of the property and "moneys in the hands of the receiver in pursuance of such "order."

It is a common exercise of discretion in chancery courts to appoint receivers for the preservation of property, pending litigation.

See Cooper's Daniel Ch. Practice, 2 vol., marginal 1725-6, and notes.

And the court below in the exercise of this power, took the possession from defendants and put the property in the hands of the receiver, and although it decided that the complainants were entitled to recover, yet from the decree an appeal was taken by defendants, and the court to hold the property pending the appeal has kept the receiver in possession, and refuses to allow plaintiffs to take it from him pending the litigation. The same power exercised to protect the plaintiffs in the first instance is invoked and maintained to protect the defendants in the appeal.

In Merrill v. Elam, 2 Tenn. Ch. R. 513, a full review of the cases is had, and in that case an appeal was taken and bond given, and the chancellor, during the same term, in order to preserve the property pending the appeal, set aside the decree and appeal so entered, and appointed a receiver, and then gave the party his decree and appeal again. And the Supreme Court of Tennessee held his action correct, and that the appointment was not revoked by the subsequent appeal.

Courts in Tennessee hold that a receiver may be appointed at any stage of a cause, when the facts of the case justify it.

Johnston v. Tucker, 2 Cooper Ch. R. 399.

Hernshaw, Ward & Co. v. Wells, 9 Hum. 568.

And such matters, granting injunctions and appointing receivers, though interlocutory in their form and nature, are so much within the discretion of the subordinate court, and necessary for the preservation of the interest of litigants, that the appellate courts will not interfere therewith.

Roberson v. Roberson, 3 B. J. Lea 50.
Beard v. Turnpike Co., 1 Lea 394.
Code of Tenn., sec. 3933, Thompson & Steeger's.

To same effect see

Foray v. Conrad, 6 Howard 204;
Railroad Co. v. Soutter, 2 Wall. 510.

In the opinion by Justice Miller, in the latter case, the court says, on page 521: "The only doubt which the court could have on the question arises from the principle that the appointment and discharge of a receiver are ordinary matters of discretion in the circuit court, *with which this court will not interfere.*"

"As a general rule, this proposition is not denied. But we do not think it applicable in the case before us."

"While the parties to this suit were fiercely litigating the amount of the mortgage debt, and questions of fraud in the origin of that debt, the appointment or the discharge of a receiver for the mortgaged property very properly belongs to the discretion of the court in which the litigation was pending."

And this court in that case only considered the question for the reason this court had already settled all the principles of the case. Here in the case at bar the case is still for trial on its merits, not having been disposed of.

In Goddard v. Ordway, 94 U. S. 693, this court lays down this elementary principle as follows: "While the court

"below may make the necessary orders to preserve the "fund, and directs its receiver to that extent, it can not "place the money beyond the control of any decree "that may be made here, for that would be to defeat our "jurisdiction." Clearly recognizing the principle that a receiver appointed by the lower court is not disturbed by appeal, but that court retains control of the property and receiver pending the appeal.

On this point see opinion of Hammond, J., in this cause on pp. 27 and 28 of record.

The only remaining question is, Had the court below the power to take a new bond after the expiration of sixty days, or to amend the order so as to operate as a *supersedeas?*

It is manifest from the record that the omission to insert "damages" in the appeal bond in order to constitute it a *supersedeas* was purely clerical or a mistake. The court had directed that a bond with penalty of one thousand dollars properly conditioned should operate as a *supersedeas*, inasmuch as the property was in the hands of a receiver of the court, and the parties clearly intended to give such a bond. See affidavit of Frayser & Poston, record 14, 15.

This question may be said to be settled now by the decision in the case of Knickerbocker Life Insurance Co. v. Pendleton and others, 115 U. S. Reports, p. 339.

In that case a judgment was rendered against the plaintiff in error on 19 May, 1881, in the lower court, and a writ of error was sued out against P. H. Pendleton alone, and the citation only named him and was served on him. The appeal bond alone was made to him. Subsequently a

supersedeas bond was executed payable to all the plaintiffs by name, and the subsequent proceedings were generally entitled in the name of P. H. Pendleton et als.

The court affirmed the judgment at January term, 1885, but subsequently discovering the defective bond, citation and writ of error, recalled their judgment and entered a rule on the plaintiffs in error to show cause why the judgment should not be vacated and the writ of error be dismissed. To this rule the defendants plead that the writ of error could not be amended. nor the citation—that more than three years had elapsed, and it was beyond the powers of the court to allow such an amendment and against the precedents established from the foundation of the court. Mr. Justice Bradley delivering the opinion, held: "On consideration of the special circumstances of the case, we allowed the writ to be amended and a new citation to be issued to all the plaintiffs below, and directed the cause to be restored to the docket for re-argument."

In the case at bar, not only was the penalty in accordance with the direction of the court, but the parties show that they thought they were giving a *supersedeas* bond, and the court finds that it was an oversight and takes a proper bond; and we insist that it was fully authorized in so doing by the decision in the case just above cited from 115 U. S. Reports, p. 339, and when taken and approved operated as a *supersedeas*.

But the cause is now pending in this court on its merits, being numbered of the present October 1887 docket, and no reason is shown or exists why this court should, pending the appeal. interfere with the preservation of the property now in the custody and keeping of the lower